TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1930

No. 517

THE KANSAS CITY SOUTHERN RAILWAY COMPANY AND TEXARKANA AND FORT SMITH RAILWAY COMPANY, APPELLANTS,

vs.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI

FILED OCTOBER 18, 1930

(35,439)

(35,439)

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[fol. a]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI

No. 1450

THE KANSAS CITY SOUTHERN RAILWAY COMPANY and TEXARKANA AND FORT SMITH RAILWAY COMPANY, Plaintiffs,

vs.

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants

Transcript

[fols. 1-3] Citation in usual form showing service on Wm. L. Vendeventer et al., filed Sept. 27, 1930, omitted in printing.

[fol. 3-1] IN UNITED STATES DISTRICT COURT FOR THE WESTERN DIVISION OF THE WESTERN DISTRICT OF MISSOURI

In Equity. No. 1450

THE KANSAS CITY SOUTHERN RAILWAY COMPANY and TEXARKANA AND FORT SMITH RAILWAY COMPANY, Petitioners,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants

PETITION—Filed Feb. 7, 1930

To the Honorable the Judges of the District Court of the United States for the Western Division of the Western District of Missouri:

The petitioners file this their petition against the United States of America, and the Interstate Commerce Commission, hereinafter called the "Commission," which is an administrative tribunal existing under and by virtue of

the Interstate Commerce Act and charged with its administration and enforcement, to enjoin, set aside, annul and suspend, in whole or in part, two certain orders, herein- [fol. 3-2] after set forth, of the Commission, dated November 4, 1929 and July 30, 1929, respectively, and thereupon petitioners complain and say:

1. The petitioners are corporations duly organized and existing under the laws of the following states: The Kansas City Southern Railway Company, herein for convenience referred to as the "Southern Company," under the laws of the State of Missouri; and the Texarkana and Fort Smith Railway Company, herein for convenience referred to as the "Texarkana Company," under the laws of the State of Texas. The Southern Company owns all the capital stock, except qualifying shares, of the Texarkana Company; and they, together with certain other minor properties, constitute what is known as the Kansas City Southern Railway System, extending from Kansas City, Missouri, to Port Arthur, Texas, and into and through the Western District of Missouri. Both of the petitioners are common carriers, subject to the Act of Congress of February 4, 1887, now designated as the Interstate Commerce Act, and the acts supplemental thereto and amendatory thereof. They are herein sometimes, for convenience, collectively referred to as the "petitioner."

2. One of the petitioners, the Southern Company, has its principal operating office in the City of Kansas City, in the Western Division of the Western District of Missouri. The matters complained of before the Commission arose in part in said district. The order of the Commission which is the subject-matter of this petition was made by the Commission upon its own motion, and not upon the petition of any party; being designated on the docket of the Commission as No. 17757, "In the Matter of Use of [fol. 3-3] Private Passenger Train Cars." The suit is brought against the defendant United States of America in said Western Division of the Western District of Missouri in accordance with the provisions of the Urgent Deficiencies Act of October 22, 1913, and petitioner invokes the jurisdiction of this court under the provisions of said Act and under the provisions of the Interstate Commerce Act, as well as under its general equity powers.

3. On the 7th day of December, 1925, the Commission, on its own motion, instituted an investigation into and concerning the use of private passenger train cars, including office cars, in the transportation of persons, with a view of making such order or orders in the premises as might be deemed by it warranted.

4. On the 23rd day of July, 1928, a proposed report in said proceeding was submitted to the Commission, and was served upon petitioner and all other carriers, and sixty days from the date of the service thereof were allowed for the filing of exceptions, which time was afterwards extended so as to include December 22, 1928. On the last-mentioned date, exceptions were duly filed and subsequently heard, and the Commission, on June 21, 1929, handed down its report, set forth in 155 I. C. C., at pages 775 to 811, inclusive, to which report reference is hereby made and petitioner prays that said report may be deemed and considered a part hereof, with like affect as if herein set forth in full.

5. On the 4th day of November, 1929, the Commission entered an order in the case, being one of the orders sought to be enjoined herein, a copy of which, marked Exihbit A, is herewith filed as a part of this petition, requiring the carriers named in the list attached thereto, including peti-[fol. 3-4] tioner, to cease and desist, on or before January 15, 1930, and thereafter to abstain, from the transportation or movement of private passenger train cars, including office cars, as hereafter defined, of another carrier free or at other than published tariff rates. By a later order the Commission extended the effective date of said order to February 13, 1930.

6. On the 30th day of July, 1929, the Commission entered an order, "In the Matter of Regulations to Govern the Forms and Recording of Passes, Issue of 1917," wherein it prohibited the issuance by a carrier of a car pass, except for cars owned by the issuing carrier or held by it under lease, for use in its business as a common carrier, a copy of which, marked Exhibit B, is attached hereto and made a part of this petition. This order, the effect of which is to prohibit the issue of a car pass for the office car of another carrier, is one of the orders sought to be enjoined herein.

7. By said orders your petitioner and other carriers, subject to the Interstate Commerce Act, are prohibited from transporting or moving, in the western District of Missouri, as well as in all other parts of the United States, private passenger train cars, including office cars, of another carrier free or at other than published tariff rates under any conditions or circumstances whatever.

8. Petitioner and many of the other railway companies in the country for many years have been, and now are, the owners of valuable office cars, which are customarily used by their officers and employees in the interest of or connected with the operation of their railroads. Said office cars constitute, in effect, offices on wheels for officials and employees whose duties require considerable travel over their [fol. 3-5] own lines and over the lines of other carriers, and they constitute an important and necessary facility for the discharge of such duties. Such cars contain eating and sleeping accommodations for the officers and employees who occupy them, and are otherwise equipped to carry office files, documents, correspondence, clerical force, and all other facilities for the transaction of the usual and ordinary business of the officials of the owning company, in substantially the same manner as such business is ordinarily conducted in offices. By the use of these cars, the officials and employees are enabled to transact their business continuously and without interruption while moving over their own lines of railroad, as well as during necessary and convenient movements over the lines of foreign carriers.

In numerous instances it has been, and is, necessary for the officials and employees of railway companies, including petitioner, in the proper discharge of their duties, to travel over foreign lines, and, in the course of such transportation, to conduct and carry on without interruption the usual and ordinary business of their companies, respectively. The efficient and economical conudct of such business requires eating and sleeping accommodations for such officials and employees, and the presence of office equipment, files, correspondence and clerical force. The office car is essentail for this purpose. Its proper and legitimate use facilitates the dispatch of business and prevents unnecessary waste of time and effort.

As one of many illustrations which might be given of the proper and legitimate use of office cars in carrying on the business of a railway company in an efficient and economical manner, petitioner shows that the executive head of the [fol. 3-6] Southern Company has long resided and now resides and has his office in the City of New York, where its Board of Directors holds meetings, monthly or oftener; and that the operating head of the Southern Company, who is a member of said Board of Directors, has long resided, and now resides, in Kansas City, Missouri. It is frequently necessary for the operating head of the company, with certain officers and employees, to travel to New York to attend meetings of the Board of Directors and for the purpose of consulting with the executive head of the company; and it is likewise necessary for the executive head of the company, with certain officers and employees, to travel between New York City and Kansas City and on the line of petitioner, for the purpose of inspection trips and other matters of business. It has been the practice in the past, for reasons of economy and convenience, for such travelling between New York City and Kansas City on the part of the executive head of the company and of its operating head, and other officers and employees, to be done to a considerable extent, in office cars, transported without charge over foreign lines between the two points, so that the business conducted by such officials might be carried on continuously and without interruption. If the Commission's orders herein complained of are permitted to go into effect, the practice above referred to, as well as all other movements of office cars over foreign lines, must necessarily be discontinued, or conducted at published tariff rates of transportation, which would be so large as to be prohibitive; and the travelling of railway officials and employees in office cars over foreign lines will cease, resulting in serious loss and disadvantage to petitioner and other carriers, [fol. 3-7] and in unnecessary interruption and delay in the transaction of petitioner's business and the performance of its public duties.

9. For many years it has been the custom and practice of many carriers, including petitioner, when requested so to do, to accept and move, when they can conveniently do so, the office cars owned by foreign lines and occupied by

officers and employees of such foreign lines, traveling in the interest of or connected with the operation of such foreign lines. For many years, also, it has been the practice of many carriers, including petitioner, when desiring to have one of its office cars, occupied by its officers and employees and engaged in the transaction of the business of the road, moved over a foreign line, to request such foreign line to make such movement; and such request ordinarily has been complied with by such foreign line, to the extent that it was able to do so without interfering with its own operations. By the uniform practice of many years' standing, such movements of office cars over foreign lines have been made by such foreign lines, as a matter of reciprocal accommodation and convenience, and without making any charge therefor. Passes, both for the free transportation of the officers and employees and for the free movement of the office car, are customarily issued by such foreign lines. Office cars when so moving over foreign lines are not articles of commerce in the course of transportation, but are instruments or facilities of the owning line, necessary and convenient for the transaction of its business. In so far as the Commission may have found the practice of moving office cars, as herein described, to be illegal or discriminatory or prejudicial, such finding is unsupported by any substantial evidence.

[fol. 3-8] 10. Petitioner further states that neither it nor any of the other carriers in the country have ever held themselves out, by published tariffs or otherwise, as common carriers of the office cars of other railway companies; and that they are under no enforceable legal obligation to accept and move such cars. They have filed tariffs with the Commission covering all transportation of persons and property which they hold themselves ready to perform for all alike, as required by paragraph (1) of Sec. 6 of the Interstate Commerce Act, but such tariffs do not now, and never have, provided for or covered the movement of the office cars of another carrier. Nor have they, aside from such tariffs, actually moved such office cars in the capacity of common carriers. All such movements of office cars over a foreign line heretofore made have been upon special request in each individual instance, which request

the foreign line was at liberty to grant or refuse in its discretion. In making such movements, the foreign line does not act as a common carrier for hire, but in its capacity of a private carrier, and, as such, may lawfully make the movement on such terms as the two interested carriers may mutually agree upon, and it has been the long continued and uniform practice throughout the country to make such movements without making any charge whatsoever therefor. Such office cars do not become or constitute any part of the common carrier equipment of such foreign lines and are not available for the general use of passengers traveling on such foreign lines. For these reasons the movement of office cars over foreign lines, as herein set forth, is a subject-matter over which the Commission is not vested with the power of regulation, and the Commission's order above referred to is to [fol. 3-9] that extent beyond the Commission's authority, and void.

11. The practice of moving the office car of another carrier, occupied by the officers and employees of the latter in the discharge of their duties as such, without imposing any charge therefor and upon passes issued by the transporting carrier covering both car and officials, has existed from the earliest day of steam railroads, and was generally known to exist and was recognized as lawful and proper at the time of the original enactment by Congress of the Interstate Commerce Act in 1887, and continuously thereafter until the making by the Commission of its order herein complained of. In the Act of 1887, it was, and is, expressly provided that nothing in it shall prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employees. Congress enacted this provision of the Act of 1887 with full knowledge of the uniform and long continued practice of moving the office cars and officers of another line on free passes, and it is deemed thereby to have given its approval to the issuance of passes for the free movement of an office car, as well as for its occupants.

In the Hepburn Act of June 29, 1906, Congress made detailed provision, effective January 1, 1907, for the issue of interstate passes to designated classes of persons; and

this Act contains a proviso that it shall not be construed to prohibit the interchange of passes for the officers, agents and employees of common carriers and their families. Congress enacted this provision with full knowledge of the uniform and long continued practice of moving the office cars and officers of another line on free passes, and [fol. 3-10] is deemed thereby again to have given its approval to the issuance of free passes for the movement of an office car, as well as for the transportation of the officers and employees occupying the car.

On June 30, 1908, in a Conference Ruling promulgated and published for the guidance of carriers, the Commission issued its regulations for the issuance of passes, and expressly provided for the issuance of car and party passes, in the following language:

"Each pass issued must bear upon its face the name of some person belonging to a class named in section 1 of the act as eligible to receive free transportation. In addition to such person so named a pass may also carry not to exceed a specified number of unnamed persons of any class eligible to receive free transportation; the number and the class to which such person belongs being specified upon the face of the pass—that is to say, passes in the following forms will be recognized by the Commission as legal:

"Pass John Smith, President, car, and five officers and employees of the X. Y. Z. Railway."

The foregoing regulation was understood by the carriers and by the public generally as authorizing the issuance by one carrier of a pass for the free movement over its line of the car of another carrier occupied by the officers and employees of such carrier; and such is the reasonable import of the language employed. This Conference Ruling was continued in effect by the Commission continuously from the date of its promulgation until it rescinded all of its Conference Rulings on December 26, 1928. During this period of 20 years, as well as prior thereto, the carriers of the country continued to move the office cars, as herein de- [fol. 3-11] fined, of other carriers on free passes, without making any charge therefor, with the full knowledge of Congress as well as the Commission, without any intimation from them, or either of them, or from any other official

source, that the practice was not a proper and lawful one, until the Commission filed its report herein, as above stated. Congress, with full knowledge of this long continued and uniform practice, and with full knowledge of the said Conference Ruling, and during the long period in which the ruling has been in force, has repeatedly and on numerous occasions amended the Interstate Commerce Act, and substantially re-enacted it, particularly sections 1 and 22 thereof, dealing with free transportation, without the expression of any dissent from said practice or said Conference Ruling, and is thereby deemed and held to have adopted and incorporated into the amended act the administrative interpretation so placed upon it by the Commission. Petitioners show, therefore, that the law permits the free movement of office cars, as herein defined, on foreign lines, and that the Commission's order is in conflict therewith, and, for that reason, illegal and void.

12. By paragraph (8) of Sec. 16 of the Interstate Commerce Act, heavy pecuniary penalties are imposed on any carrier, as well as on its officers, representatives or agents, who knowingly fails or neglects to obey any such order of the Commission as that entered by it, as hereinbefore alleged, on the 4th day of November, 1929, and as that entered by it as aforesaid on the 30th day of July, 1929, to-wit, a forfeiture to the United States of the sum of five thousand dollars for each offense, every distinct violation being de- [fol. 3-12] fined as a separate offense and, in case of a continuing violation, each day to be deemed a separate offense.

13. Your petitioner further shows that said order of November 4, 1929, and said order of July 30, 1929, are erroneous, and not supported by evidence or authorized by law, are beyond the power or authority of the Commission, and are invalid in so far as they, or either of them, undertake to declare unlawful and to forbid the transportation or movement by a carrier subject to the Interstate Commerce Act of office cars, owned by another such carrier free or at other than published tariff rates when occupied by officers or employees holding proper transportation and traveling in the interest of or connected with the operation of their railroad; and the effect of said orders, if enforced, will be to deprive your petitioner and other carriers similarly situated of the right to make a lawful use of their respective

properties and to make lawful contracts of transportation in relation thereto, and consequently to deprive them of their properties without due process of law, contrary to the provisions of the Fifth Amendment to the Constitution of the United States.

Wherefore your petitioners pray——

1. That the United States of America and the Interstate Commerce Commission be made parties defendant to this petition and that subpoenas in chancery issue out of and under the seal of this Honorable Court, directed to the defendants, as required by law, and that due and proper service of such process and of this petition be forthwith made by filing a copy thereof in the office of the Secretary of the Commission, and another copy in the Department of Jus- [fol. 3-13] tice, as in the District Court Jurisdiction Act provided, and that thereby the defendants, and each of them, be required, on or before a date to be specified in such subpoenas or notices, to appear herein and answer this petition, but not under oath, answer under oath being hereby expressly waived.

2. That a temporary or interlocutory injunction be entered herein, restraining, enjoining and suspending, until the further order of this court, the effect and enforcement of said orders of the Commission, in so far as they are hereinbefore complained of as illegal.

3. That after final hearing this court adjudged, order and decree that said findings of the Commission and its said orders are and have at all times been beyond the lawful authority of the Commission in so far as they, or either of them, undertake to declare unlawful and to prohibit the transportation or movement free and without charge by one carrier subject to the Interstate Commerce Act of the office car of another such carrier when occupied by its officers and employees, lawfully entitled to transportation, and traveling in the interest of or in connection with the business of such railroad; and that said orders, to the extent herein complained of as unlawful, be perpetually set aside, suspended and annulled, and the enforcement thereof perpetually enjoined.

4. That your petitioners, and each of them, may have such other and further relief in the premises as in equity

and justice they are entitled to receive and as may be deemed by this Honorable Court to be adequate and proper under the circumstances.

[fol. 3-14] And, as in duty bound, your petitioners will ever pray, etc.

The Kansas City Southern Railway Company, Texarkana and Fort Smith Railway Company, by Frank H. Moore, A. F. Smith, Cyrus Crane, Solicitors. Samuel W. Moore, of Counsel.

Duly sworn to by C. E. Johnston. Jurat omitted in printing.

[fol. 3-15] EXHIBIT "A" TO PETITION

Order

AT A GENERAL SESSION OF THE INTERSTATE COMMERCE COMMISSION, Held at Its Office, in Washington, D. C., on the 4th Day of November, A. D. 1929

No. 17757

In the Matter of Use of Private Passenger Train Cars

It appearing, That, in compliance with the statute in such case made and provided, this commission, upon its own motion, entered into an investigation into and concerning certain questions arising under Sections 2, 3, 6 and 22 of the Interstate Commerce Act as to the transportation or movement of private passenger cars, including so-called office cars, of one carrier subject to the Act by another such carrier free or at other than published tariff rates, and relating to the enforcement of the foregoing provisions of the Act in that regard; and

It further appearing, That a full investigation of the matters and things involved was had, in the course of and pursuant to which a proposed report was submitted to the Commission, whereupon the carriers named in the list hereto attached appeared and by counsel excepted to said report, on which exceptions argument, oral and in writing, was had; and

It further appearing, That on the 21st day of June, 1929, this Commission after full consideration overruled said exceptions and made and filed a report containing its conclusions thereon, which report is hereby referred to and [fol. 3-16] made a part hereof, and therein decided:

1. That the transportation or movement of private passenger cars, including so-called office cars, of one carrier subject to the Interstate Commerce Act by another such carrier free or at other than published tariff rates is contrary to the provisions of the Interstate Commerce Act;

2. That it is unjustly discriminatory and unduly preferential and prejudicial to haul such private cars of other carriers free, or at less than published tariff rates, while charging certain minimum fares and revenues for the movement of privately owned or chartered cars; and

3. That the transportation of persons in such private passenger cars, including berth and other accommodations, at the rate charged passengers provided only with ordinary coach accommodations is unjustly discriminatory and unduly preferential and prejudicial.

In its report the Commission declared that no order appeared to be necessary. On further and subsequent consideration, however, the Commission is of opinion that an order in the premises is proper and appropriate, and, the exceptants to the said proposed report having appeared before the Commission and expressly waived any further hearing in the premises,

It is ordered, That the carriers named in the list herein before referred to and attached hereto, on behalf of which such exceptions were filed and argument heard and on whose behalf a waiver of further hearing has been expressly made, be, and each of them hereby is, notified and required to cease and desist, on or before January 15, 1930, and [fol. 3-17] thereafter to abstain, from the transportation or movement of private passenger train cars, including so-called office cars, of another carrier free or at other than published tariff rates.

And it is further ordered, That this order shall continue in force until the further order of the Commission.

By the Commission.

George B. McGinty, Secretary. (Seal.)

[fol. 3-18] EXHIBIT "B" TO PETITION

INTERSTATE COMMERCE COMMISSION, WASHINGTON

In the Matter of Regulations to Govern the Forms and Recording of Passes, Issue of 1917

At a Session of the Interstate Commerce Commission, Division 4, Held at Its Office, in Washington, D. C., on the 30th Day of July, A. D. 1929

The matter of issuing passes for private passenger train cars being under consideration:

It is ordered: That the Regulations to Govern the Forms and Recording of Passes, Issue of 1917, prescribed under an order of the Commission, entered on July 8, 1916, be and the same are, hereby amended by adding between lines 11 and 12 in paragraph 15 the following:

A car pass may be issued only for cars owned by the issuing carrier or held by it under lease for use in its business as a common carrier. It may not be issued for other cars. This provision is not to be construed as prohibiting the issuance of passes for cars of lines operated as a part of the same system. See In the Matter of the Use of Private Passenger Train Cars, 155 I. C. C. 775.

It is further ordered: That this order shall become effective on August 1, 1929.

By the Commission, Division 4.

George B. McGinty, Secretary.

[fol. 4] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF THE UNITED STATES OF AMERICA—Filed Mar. 7, 1930

United States, one of the above named defendants, for answer to the petition filed therein against it says:

I

United States admits for the purposes of this suit, the allegation of the opening paragraph and paragraphs 1 to

7, both inclusive, of the petition, except this: It denies that the suit instituted by the petition is brought under or invoked the general equity jurisdiction or powers of this Court.

II

United States alleges that the matters and things set forth and alleged in paragraphs 8, 9 and 10 of the petition, are argumentative, based on speculation and conclusion, and are irrelevant, incompetent and immaterial, and as to them, therefore, United States neither admits nor denies, except this:

[fol. 5] (a) It denies the allegation in said paragraph 8, that said orders of the Interstate Commerce Commission require discontinuance of the movement of so-called private passenger cars, or office cars of common carriers on the lines of other common carriers, and alleges that, on the contrary, petitioners and all other common carriers are free, under the terms of said orders, to continue the practice of transporting such cars if, as, and when they so desire, upon collection or payment of published tariff rates therefor.

(b) It denies the allegation in said paragraph 9, that:

In so far as the Commission may have found the practice of moving office cars, as herein described, to be illegal or discriminatory or prejudicial, such finding is unsupported by any substantial evidence.

(c) It denies the allegation in said paragraph 9, that:

Office cars when so moving over foreign lines are not articles of commerce in the course of transportation.

(d) It admits the allegation in said paragraph 10 that said tariffs of petitioners and other carriers do not expressly name charges on carrier-owned private or office cars transported by other carriers for exclusive use of the owning carriers or their officials, but alleges that said tariffs do name certain minimum charges for the transportation of privately owned or chartered cars transported for the exclusive use of special parties, and admits that said tariffs do not define the term "privately owned cars"; it further

admits that it has long been the practice of carriers throughout the country to move private or office cars of other car-
[fol. 6] riers without making any charge therefor; and admits and alleges that when so transported, such cars do not become or constitute any part of the common carrier equipment of the carriers transporting them; and further admits that such cars are not available for general use of passengers traveling on the lines of the transporting carriers.

(c) It denies the allegation in said paragraph 10, that:

• • • the movement of office cars over foreign lines, as herein set forth, is a subject-matter over which the Commission is not vested with the power of regulation, and the Commission's order above referred to is to that extent beyond the Commission's authority and void.

III

United States alleges that the matters and things alleged in paragraph 11 of the petition, in substance, that the free transportation by carriers of office cars of other carriers is a practice which has existed for many years, "and was recognized as lawful and proper at the time of the original enactment by Congress of the Interstate Commerce Act in 1887, and continuously thereafter until the making by the Commission of its order herein complained of"; that by providing in that Act that railroad companies might lawfully exchange passes or tickets with each other for the transportation of their officers and employees, Congress acted "with full knowledge of the uniform and long continued practice of moving the office cars and officers of another line on free passes, and it is deemed thereby to have given its approval to the issuance of passes for the free movement of an office car, as well as for its occupants;" and that the Commission is deemed to have approved said
[fol. 7] practice, are all argumentative, speculative, and are incompetent, irrelevant and immaterial and do not require answer; therefore, as to them, United States neither admits nor denies, except that: It denies the allegation in said paragraph 11, that:

• • • the law permits the free movement of office cars, as herein defined, on foreign lines, and that the Commis-

sion's order is in conflict therewith, and, for that reason, illegal and void.

United States says that if the allegations of said paragraph 11, should become relevant, material or competent, it will demand strict proof of each and all of them.

Further and affirmatively answering the allegations of said paragraph 11, United States says that although the Hepburn Act therein mentioned did provide for the interchange by common carriers of passes or tickets for the free transportation of their officers and employees and certain other described classes of persons, said act did not, nor does any other statute of the United States provide that carriers may transport each other's private or office cars free of charge.

IV

United States for answer to paragraph 12, of the petition, admits and alleges that paragraph (8) of Section 16 of the Interstate Commerce Act provides, in the following language, that:

"(8) Any carrier, any officer, representative, or agent of a carrier, or any receiver, trustee, lessee, or agent of either of them, who knowingly fails or neglects to obey any order made under the provisions of sections 3, 13, or 15 of this Act shall forfeit to the United States the sum of $5,000 for each offense. Every distinct violation shall be a separate offense, and in case of a continuing violation each day shall be deemed a separate offense.

Further answering said paragraph 12, United States denies that said order issued July 30, 1929, by the Commis- [fol. 8] sion was made under either of said sections 3, 13, or 15 of said Act; and alleges that said order was made under Section 20 of said Act, in that it was an amendment to the Commission's Regulations to Govern the Form and Recording of Passes which had been prescribed pursuant to said Section 20.

V

United States denies each and every allegation made and contained in paragraph 13, of the petition.

VI

Except as expressly admitted herein, United States denies each and every allegation in the petition which is or may be inconsistent or in conflict with either the allegations herein made, or the statements, findings and conclusions set forth and contained in said orders of the Commission.

Wherefore, having fully answered, United States prays that the relief sought be denied and the petition dismissed with cost to petitioners.

Elmer B. Collins, Special Assistant to the Attorney General. John Lord O'Brien, The Assistant to the Attorney General. Wm. L. Vandeventer, United States Attorney.

[fol. 9] *Duly sworn to by Elmer B. Collins. Jurat omitted in printing.*

[fol. 10] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF INTERSTATE COMMERCE COMMISSION—Filed Mar. 10, 1930

The Interstate Commerce Commission, one of the defendants in the above-entitled suit, now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies contained in the petition, for answer thereunto or unto so much or such parts thereof as it is advised that it is material for it to answer, answers and says:

I

Answering the opening paragraph and subdivisions numbered 1 to 3 inclusive, of the petition, the Interstate Commerce Commission, hereinafter called the Commission, admits the truth of the allegations therein contained, except that it denies that this suit has been brought and denies

that it may be maintained, under the general equity jurisdiction of the court.

II

Answering subdivisions numbered 4 and 5, inclusive, of the petition, the Commission admits and alleges that it made and entered the report of June 21, 1929, and the order of November 4, 1929, therein referred to; admits that the document attached to the petition, marked Exhibit "A", is a true and correct copy of its said order of November 4, 1929; and respectfully refers the Court to said document for information as to the contents and provisions of said order.

[fol. 11] III

Answering subdivision numbered 6 of the petition, the Commission admits that it made and entered the order of July 30, 1929, therein referred to as being one of the orders sought to be enjoined; admits that the document attached to the petition, marked Exhibit "B", is a true and correct copy of said order; admits and alleges that said order amended, in the particulars as shown in said copy so attached to the petition, the Commission's "Regulations to Govern the Forms and Recording of Passes, Issue of 1917," a true copy whereof is attached to this Answer and made a part hereof, marked Exhibit "A". Except as so admitted the Commission denies the truth of the allegations contained in said subdivision.

IV

Answering subdivision numbered 7 of the petition, the Commission denies that the statement therein contained in respect of its said orders of November 4, 1929, and of July 30, 1929, accurately interprets said orders. The Commission respectfully refers the Court to the copies of said orders attached to the petition, for full and correct information in the premises.

V

Answering subdivision numbered 8 of the petition, the Commission alleges that the allegations therein contained

are incompetent, irrelevant and immaterial and, therefore, neither admits nor denies the truth thereof, except that the Commission denies the allegations contained in the last sentence of said subdivison relative to the future effects of the orders of the Commission.

VI

Answering subdivision numbered 9 of the petition, the Commission denies the truth of the allegations that "movements of office cars over foreign lines have been made by such foreign lines, as a matter of reciprocal accommodation and convenience," in so far as it is an allegation that the practice of moving free the office cars of other carriers is [fol. 12] based on a reciprocal exchange as between carriers of an equivalent amount of free service; denies the truth of the allegation that "Office cars when so moving over foreign lines are not articles of commerce," and denies the truth of the allegation that "In so far as the Commission may have found the practice of moving office cars, as herein described, to be illegal or discriminatory or prejudicial, such finding is unsupported by evidence."

VII

Answering the allegation, in subdivision numbered 10 of the petition, that the tariffs of petitioners and other carriers do not provide for or cover the movement of the office cars of other carriers, the Commission alleges that the tariffs of petitioners and other carriers name certain minimum charges on privately-owner or chartered cars, transported for the exclusive use of special parties, but the Commission admits that said tariffs do not define the term privately-owned cars, and admits that said tariffs do not expressly name charges on carrier-owned private or office cars transported for the exclusive use of the owning carriers or their officials. Further answering said subdivision 10, the Commission admits that the movements over foreign lines of the private or office cars of other carriers have been made upon special request; admits that it has been the long continued and uniform practice throughout the country to make such movements without making any charge whatsoever therefor; admits and alleges that such

cars do not become or constitute any part of the common carrier equipment of such foreign lines and admits and alleges that such cars are not available for the general use of passengers travelling on such foreign lines. Except as so expressly alleged and admitted, the Commission denies the truth of each of and all the allegations contained in said subdivision 10.

VIII

Answering subdivision numbered 11, the Commission [fol. 13] admits that the practice of making the private or office cars of other carriers subject to use by passholders, without imposing any charge therefor, existed at the time of the making of its order herein complained of and for a long time prior thereto, admits that the statements in said subdivision relating to the provisions permitting the railroads to interchange passes contained in the original Act to Regulate Commerce, 1887, and in the Hepburn Act of 1906, are substantially correct, but for full and complete information in the premises the Commission respectfully refers the Court to said Acts of Congress, admits that its Conference Rulings up to the time that they were rescinded, namely, December 20, 1926, prescribed the form of pass set forth in said subdivision, admits that since the original enactment in 1887 of the Act to Regulate Commerce, Congress has on numerous occasions amended said Act. Except as so expressly admitted, the Commission denies the truth of each of and all the allegations contained in said subdivision.

IX

Answering subdivision numbered 12 of the petition, the Commission denies that its order of July 30, 1929, is an order within the meaning of paragraph (8) of section 16 of the Interstate Commerce Act. The Commission alleges that penalties prescribed by said paragraph are applicable only to violation of orders made by the Commission under sections 3, 13 or 15 of the Act, that its said order of July 30, 1929, was not made under any of these sections but was made under section 20 of said Act, in that it was an amendment to its Regulations to Govern the Form and Recording of Passes, which had been prescribed in accordance with said section 20.

X

Answering subdivision numbered 13 of the petition, the Commission denies the truth of each of and all of the allegations therein contained.

Except as herein expressly admitted, the Commission denies each of and all the pertinent and material allega- [fol. 14] tions contained in the petition in so far as they conflict either with the allegations or denials of the Commission herein contained or with the statements of fact contained in the Commission's said report of June 21, 1929.

All of which matters and things the Commission is ready to aver, maintain, and prove as this honorable Court shall direct, and hereby prays that said petition be dismissed.

Interstate Commerce Commission, by Nelson Thomas, Attorney. Daniel W. Knowlton, of Counsel

Duly sworn to by Frank McManamy. Jurat omitted in printing.

REGULATIONS

TO GOVERN THE

FORMS AND RECORDING OF PASSES

PRESCRIBED BY THE

INTERSTATE COMMERCE COMMISSION

IN ACCORDANCE WITH SECTION 20 OF THE ACT TO REGULATE COMMERCE

ISSUE OF 1917

Effective on January 1, 1917

(Superseding and canceling Regulations to Govern the Issuing and Recording of Passes of Steam Roads)



WASHINGTON
GOVERNMENT PRINTING OFFICE
1916

24

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WASHINGTON
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1916

THE INTERSTATE COMMERCE COMMISSION.

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ORDER.

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 8th day of July, A. D. 1916.

The subject of a uniform system for the issuing and recording of passes to be prescribed for carriers being under consideration, the following order was entered:

It is ordered, That the following Regulations to Govern the Forms and Recording of Passes, Issue of 1917, be, and the same are hereby, approved; that a copy thereof duly authenticated by the Secretary of the Commission be filed in its archives, and a second copy thereof, in like manner authenticated, in the office of the Division of Carriers' Accounts; and that each of the said copies so authenticated and filed shall be deemed an original record thereof.

It is further ordered, That the said Regulations be, and are hereby, prescribed for the use of carriers by rail (including electric railways), carriers by water, and sleeping car companies, subject to the provisions of the amended act to regulate commerce in the issuing and recording of passes; that each and every such carrier and each and every receiver or operating trustee of any such carrier be required to issue all passes and keep all pass records in conformity therewith; and that a copy of the said Regulations be sent to each and every such carrier and to each and every receiver or operating trustee of any such carrier.

It is further ordered, That the said Regulations are, and by virtue of this order do become, the lawful rules according to which all passes are to be issued and all pass records are to be kept; that each and every person directly in charge of the free transportation of any such carrier or of any receiver or operating trustee of any such carrier is hereby required to see to, and under the law is responsible for, the correct application of the said regulations in the issuing and recording of passes; and that it shall be unlawful for any such carrier or for any receiver or operating trustee of any such carrier, or for any person directly in charge of the free transportation of any such carrier or of any receiver or operating trustee of any such carrier, to issue any passes or to keep any pass records except in the manner and form in the said Regulations set forth and hereby prescribed, and except as hereinafter authorized.

It is further ordered, That any such carrier or any receiver or operating trustee of any such carrier may adopt additional record forms: *Provided, however*, That a list of such additional record forms, showing their use and their purpose, be first filed in the office of the Division of Carriers' Accounts, subject to disapproval by the Commission.

It is further ordered, That the said Regulations to Govern the Forms and Recording of Passes, Issue of 1917, shall become effective on January 1, 1917, and that this order shall supersede and cancel the orders of June 8, 1911, March 11, 1912, May 6, 1912, and June 28, 1915, in the matter of regulations to govern the issuing and recording of passes of steam roads.

By the Commission.

[SEAL.] GEORGE B. MCGINTY,
Secretary.

REGULATIONS TO GOVERN THE FORMS AND RECORDING OF PASSES.

These regulations apply to all carriers of classes designated in the order whether passes are issued or are honored for transportation wholly within one state or otherwise, and whether the operated mileage or termini of any such carrier be located entirely within the limits of one state or otherwise.

Nonrevenue passenger service.

1. All nonrevenue passenger service, whether transportation, meals, or sleeping, parlor, or other accommodations, except as provided in paragraphs 39 and 42 to 51, inclusive, furnished by steam roads, electric railways, carriers by water, and sleeping car companies, subject to these regulations, shall be covered by passes as hereinafter prescribed.

General classes of passes.

2. Passes issued shall consist of not more than eight general classes, viz:

1. Annual or term passes for passage only.
2. Annual or term passes for meals and sleeping, parlor, and other accommodations, but not including passage.
3. Annual or term passes for passage, including meals and sleeping, parlor, and other accommodations.
4. Trip passes for passage only.
5. Trip passes for meals and sleeping, parlor, and other accommodations, but not including passage.
6. Trip passes for passage, including meals and sleeping, parlor, and other accommodations.
7. Commuter passes.
8. Telegraph passes.

(*a*) *Annual* passes are those good until the end of the calendar year without restriction as to the number of trips.

Term passes are those good for a specified period of time less than a year and without restriction as to the number of trips.

Trip passes are those good for a specified period of time and restricted to a single trip or to one round trip.

Commuter passes are those good for a specified period of time and restricted as to the number of trips. This form of pass need not be confined to suburban territory, but may be issued over any portion of a carrier's line.

Telegraph passes are those issued upon telegraphic or telephonic authority and restricted to a trip in one direction within a specified period of time.

(*b*) Carriers are at liberty to enlarge this classification of pass forms, provided it is done by subdividing any of the general classes, and provided further, that the record of pass stock received and distributed shows the distinctive features of pass forms so subdivided. (See par. 12.) It is not desired that carriers file with the Commission samples of their passes.

(*c*) If the number of passes to be issued for meals and sleeping, parlor, and other accommodations, including passage, is relatively small, carriers are permitted to indorse a pass of any class prepared for passage only so as to include such accommodations as are to be furnished. (See par. 54.)

Officers issuing and requesting passes.

3. Each carrier shall file with the Commission, on or before January 1 of each year, (*a*) A list of the names and titles of officers in whom is reposed the authority for the issuance of passes and over whose signatures passes will be issued, and (*b*) a list of the names and titles of officers having the authority to request passes of other carriers. (See par. 5.) Any changes in these lists in the course of the year must be reported promptly.

4. The names and titles of persons authorized to countersign passes and requests for passes need not be filed with the Commission.

5. Requests for passes for or on account of officers or employees of traffic associations, fast freight lines, demurrage and car-service bureaus, weighing and inspection bureaus, and other joint agencies maintained by or on behalf of carriers subject to these regulations, for transportation over the lines which are members of such associations may be made direct on such lines in the same manner as provided for requests for passes for or on account of a carrier's own officers or employees. (See par. 27.) Requests for passes over lines other than member lines must be made in one of the three following methods:

(*a*) Requests may be made over the signature of an officer of a member line if such officer's name has been filed with the Commission by such member line in compliance with paragraph 3 (*b*), with the counter signature of an officer or employee of the association.

(*b*) Requests may be made over the signature of an officer of the association if such officer's name has been filed with the Commission by one or more of the member lines in accordance with paragraph 3 (*b*) as having authority to request passes on account of the association.

(*c*) Requests may be made over the signatures of officers of the association if such officers' names have been filed with the Commission in accordance with paragraph 3 (*b*) by the chief officer of the

association, provided such chief officer has been delegated authority to so act by the member lines.

Signatures of issuing officers.

6. Each pass (except a telegraph pass) must bear either the autograph or the facsimile signature of one of the officers named in the list referred to in clause (*a*) in paragraph 3.

7. Each pass bearing facsimile signature must be countersigned with ink, except as provided in paragraph 13, by an officer or responsible subordinate, who must be designated on the pass.

Pass stock.

8. The ordering of all pass stock must be confined to requisitions made by a single designated officer and delivery of the entire stock must be made to him. All vouchers or bills covering the cost of pass stock shall be approved by the officer making requisition therefor before they are carried through the accounts for payment. Unissued pass stock must be filed in such manner as to be accessible and convenient for examination.

Numbering passes.

9. All passes (except telegraph passes issued on telegraph blanks) shall be consecutively numbered before or immediately upon receipt from the printer or stationer. No two passes of the same general class shall bear the same number without an indicative letter prefixed or affixed. Unless all passes are numbered in one series, each general class adopted shall constitute a series of numbers and each subdivision of any general class adopted shall constitute a series of numbers with an indicative letter prefixed or affixed.

10. If a separate stock of passes is provided for each year the numbering must begin with 0 or 1 at the beginning of the year. If the same stock is used for two or more years the numbers may continue consecutively from year to year, commencing with 0 or 1 when desired, but not oftener than once in each calendar year.

11. If adherence to these rules would result in passes carrying numbers consisting of more than five figures, a new series of numbers beginning with 0 or 1 with a letter prefixed may be adopted, provided the letter so prefixed does not occur on any other class of passes.

Record of pass stock received and distributed.

12. A record of pass stock received and distributed must be kept by the officer ordering the pass stock. (See Form 9.) Each of the different forms and series of passes received must be entered on separate sheets or pages and must be recorded and distributed in numerical order. This record must show the form of pass, also the distinctive features of any pass prepared as a subdivision of any of the general classes as provided in paragraph 2(*b*). On the debit side of the record must be entered the entire pass stock received. On the

credit side must be entered all pass stock distributed among other officers or countersigning subordinates, all stock assigned to the officer ordering the stock and issuable by him, and all pass stock destroyed. (For the periods of retention see regulations to govern the destruction of records.)

Preparation of passes.

13. All passes must be filled out with a durable ink, either with pen or typewriter, or by printing, except that in case of emergency a trip pass may be filled out and countersigned by the use of indelible pencil.

14. Each pass issued must bear upon its face the name of the person to be accorded free transportation, who must be of a class named in section 1 of the act to regulate commerce as eligible to receive free transportation.

15. A pass may include, in addition to the person named thereon, a specified number of unnamed persons of any class eligible to receive free transportation, the number and the class to which such persons belong being specified upon the pass; e. g.,

Pass John Smith, car, and five officers and employees.
Account President, officers, and employees X. Y. & Z. Ry.
Pass John Smith and six employees.
Account Section foreman and laborers X. Y. & Z. Ry.
Pass One extra messenger when presented with letter signed by superintendent of Eastern Express Co. authorizing use and giving name of person to be passed.
Account Messenger, Eastern Express Co.

A pass for "John Smith and three children" is not a sufficient compliance with the provisions of this paragraph; it must be made so that the representation that they are the children of the person named shall affirmatively appear; e. g.,

Pass John Smith, one son, and two daughters.
Account Brakeman, X. Y. & Z. Ry.

16. The name of the person presenting the pass must appear upon it unless it be prepared similar to the third example of paragraph 15, and presented with letter authorizing use and giving name of person to be passed. Passes issued for the transportation of more than one person so as to be used by such persons separately must name the person actually using the pass. For instance, a pass to be used by John Smith and his daughter, separately, or a pass to be used by William Brown and one brakeman, separately, should read:

Pass John Smith and Miss Mary Smith.
Pass John Smith and daughter Mary.
Pass William Brown and Edgar Moore.

A pass issued to "John Smith and wife" or to "Mr. and Mrs. John Smith" is construed as if having the name of the wife appearing upon it and may be used by her in the absence of her husband.

17. Each pass must show, in accordance with the following, on what account it is issued:

(*a*) A pass for an officer or employee of the carrier issuing the pass must show the title or occupation of the person to whom it is issued, e. g.,

Pass John Smith.
Account Brakeman.

(*b*) A pass for a member of the family of an officer or employee of the carrier issuing the pass must show the name of such officer or employee, except as provided in paragraph 17 (*c*), his title or occupation, and the relationship of the person to whom it is issued, e. g.,

Pass Miss Mary Smith.
Account Daughter of John Smith, brakeman.

(*c*) A pass for the wife of an officer or employee of the carrier issuing the pass, which shows the husband's Christian name, may omit, after "Account," the name of such officer or employee, e. g.,

Pass Mrs. John Smith.
Account Wife of brakeman.

(*d*) A pass for an officer or employee of a carrier other than the carrier issuing the pass must show the title or occupation of the person to whom the pass is issued and the name of the carrier by which employed, e. g.,

Pass John Smith.
Account Brakeman, A. & B. R. R.

(*e*) A pass for a member of the family of an officer or employee of a carrier other than the carrier issuing the pass must show the name of such officer or employee, except as provided in paragraph 17 (*f*), his title or occupation, the relationship of the person to whom the pass is issued, and the name of the carrier by which employed, e. g.,

Pass Miss Mary Smith.
Account Daughter of John Smith, brakeman, A. & B. R. R.

(*f*) A pass for the wife of an officer or employee of a carrier other than the carrier issuing the pass, which shows the husband's Christian name, may omit, after "Account," the name of such officer or employee, e. g.,

Pass Mrs. George Brown.
Account Wife of clerk, A. & B. R. R.

(*g*) Every pass issued to a person other than an officer or employee of a common carrier or members of their families must state in the space provided for "Account" the reason for the issuance of the pass, e. g.,

Pass Mrs. Sarah Jones.
Account Charity.
Pass Mr. Henry Brown.
Account Traveling secretary, R. R. Y. M. C. A.

18. Every pass issued upon which meals, or sleeping, parlor, or other accommodations are to be furnished free must indicate the character of the accommodations to be furnished thereon, e. g.,

(*a*) When pass does not include passage (see Forms 2 and 5):

To occupy one stateroom.
To meals and berth.

(*b*) When pass includes passage and accommodations (see Forms 3 and 6):

Including parlor room.
Including meals and berth.

19. The territory in which or the points between which a pass will be honored must be shown upon it, e. g.,

From ——— to ———.
Between ——— and ———.
Over entire system.

20. The period of time for which a pass will be accepted for transportation must be indicated upon it, e. g.,

Until ———.
Good for one trip only until ———.
Expires ———.
If used within ——— days.

Requests for passes.

21. Passes shall be issued only upon written requests, or telegraphic requests confirmed by written requests, except as provided in paragraphs 23 and 24, and in accordance with the forms hereinafter prescribed as applicable.

22. All the information required to be shown on passes issued, as prescribed in paragraphs 14 to 20, inclusive, must be indicated on requests for passes. In addition to such information requests must furnish information in accordance with the following:

(*a*) The address of the person for whom the pass is requested.

(*b*) If request be made for a pass for or on account of an officer or employee of a carrier other than the carrier by which such pass may be issued, it must contain a statement that the person for whom the pass is requested is not prohibited by law from receiving free transportation. (Forms 16 and 17.)

(*c*) If request be made for a pass for a person other than an officer or employee, or the member of the family of an officer or employee, of a common carrier the request must give evidence, clearly set forth, or be accompanied by papers, showing the legality of the issuance of the pass requested. No form is prescribed for requests of this character.

23. Written requests for passes may be dispensed with in the following cases, provided the records of passes issued show the full

information required, and in addition state upon whose authority the passes were issued and the reasons for dispensing with written requests:

(*a*) For passes issued to employees engaged in the office in which the passes are actually prepared.

(*b*) For passes sent to employees attached to the office in which the passes are actually prepared but temporarily located at other points to travel upon instructions from such office.

(*c*) In cases of emergency requiring immediate use of pass and when there is insufficient time to procure written requests before issuance.

24. Carriers may, at their option, permit their principal officers to furnish passes to officers and employees, and to the members of families of officers and employees, of other carriers subject to these regulations, who are not prohibited by law from using free transportation, without requiring written requests, provided:

(*a*) That acknowledgments, in accordance with Form 22 hereinafter prescribed, be secured from the persons to whom or on whose account the passes are issued, or from an officer whose name has been filed with the Commission, in compliance with paragraph 3 (*b*), of the carrier on whose account the passes are issued; and provided further,

(*b*) That notices, in accordance with Form 23 hereinafter prescribed, be given the carriers on whose account the passes are issued through the officers of such carriers ordinarily authorized to issue requests on other carriers for passes (see par. 68); and provided further,

(*c*) That the records of the issuing carriers show upon whose authority the passes are issued.

Carriers should be prepared to furnish the Commission, when so required, a full report of passes issued without written requests under the provisions of this section.

25. Notices to other carriers advising of the issuance of passes without written requests must be made in duplicate, or legible impression copies must be taken of them, and the duplicates or impression copies must be retained by the issuing carrier.

26. Requests for passes, also acknowledgments received and copies of notices retained for passes issued without requests, must be filed in the office in which are filed records of annual or term passes or the stubs or carbon copies of trip passes, and in such manner as to be accessible and convenient for examination. The numbers of the passes issued must be noted upon the faces of the requests.

Signatures on requests for passes.

27. Requests for passes for or on account of a carrier's own officers or employees must be made over the signature of the person to whom or on whose account the passes may be issued or by a superior or ranking officer or employee. (See par. 5 regarding joint agencies, etc.)

28. Requests for passes for or on account of officers or employees of a carrier subject to these regulations, other than the carrier issuing the pass, must be over either the autograph or facsimile signature of one of the officers named in the list referred to in clause (*b*) paragraph 3. In case the facsimile signature is used, the request must be countersigned with ink by an officer or responsible subordinate, who must be designated thereon. (See par. 5 regarding joint agencies, etc.)

29. Requests for passes for any persons not covered by paragraphs 27 or 28 must be made over the signatures of the persons making such requests.

Signatures of users of passes.

30. All passes must bear the signatures of the users, preferably in ink. On the back of each pass, other than a telegraph pass issued on a telegraph blank, must appear a statement that the holder is not prohibited by law from receiving free transportation, and that the pass will be lawfully used. This statement may be shown among other conditions, if any, and must be subscribed to by the holder.

31. A pass issued for a number of persons, but naming only one person, such as—

> John Smith, section foreman, and six employees of X. Y. & Z. Ry.
> George Jones and two daughters,

need be signed only by the person whose name appears on the pass.

32. A pass issued for a number of persons, the names of all appearing on the pass, such as—

> William Brown and Edgar Moore, brakemen,

must be signed by the users, whether the pass is used by one or by more than one of the persons named thereon; except that such pass when issued to the members of a family need be signed only by one of the persons using it.

33. A pass issued for a person without giving the name, such as—

> Pass one extra messenger when presented with letter, etc.,

need not be signed by the user. The letter or identification form which accompanies the pass must be indorsed by the user and collected and filed with collected trip passes.

Telegraph passes.

34. Telegraph passes may be issued in cases of emergency only and shall be confined to one-way passage. The issuance of telegraph passes shall be over the name of one of the officers named in the list referred to in clause (*a*) in paragraph 3 or that of one of the countersigning officers referred to in paragraph 7, and only within the territory over which such officers have authority to issue annual, term, or trip passes.

35. Telegraph passes must be issued either on telegraph blanks in accordance with Form 8 or on a special printed form of telegraph pass, showing the same data as required on Form 8 but similar in form to trip passes.

36. Copies of telegraph passes and of the telegrams authorizing issuance of printed forms of telegraph passes must be made by the issuing officer and filed with the stubs or carbon copies of trip passes.

37. If, after a telegraph pass is used, a trip pass is substituted therefor, the former should be filed with requests for trip passes as the authority for issuing the latter.

38. Except as provided in the preceding paragraph, used telegraph passes must be filed with used trip passes.

Tickets in lieu of passes.

39. Detectives and others engaged in similar work and, in cases of emergency, employees and others entitled to free transportation, may be furnished with regular passenger tickets or may be permitted to purchase tickets and have the amounts paid therefor afterwards refunded. In such cases the ticket agent's report of the tickets "without value," or the vouchers refunding the amounts paid for the tickets, must be supported by the authority of one of the officers named in the list referred to in clause (*a*) in paragraph 3. Applications for refunds of fares paid or the authorities for such refunds must show the same information as is required to be shown on the requests for passes referred to in paragraph 22. When detectives and others engaged in similar work are known by number only and it is desired that their names shall not appear in the records, the numbers may be substituted for the names on the authorities referred to above. Carriers must be prepared to furnish adequate evidence that the persons so designated were actually engaged in the service shown on the authorities.

40. The use of a special form of free ticket according to the holder certain privileges or accommodations, such as meals, staterooms, berths, or the use of limited trains, is prohibited. If such form is desired it must be issued either in regular pass form or as a subdivision of one of the general classes as provided for in paragraph 2 (*b*).

Record of free tickets issued.

41. A complete record of all tickets issued in lieu of passes, including tickets for which the fares have been refunded as well as those issued free, must be maintained by carriers and filed in the office of the officer authorizing such issuance or refund. This record must show the date; form and number of ticket; stations from and to; name and address or other designation of person to whom issued; account of issuance (in accordance with par. 17); amount of fare; and name of officer authorizing the issuance of free ticket or refund of fare paid. (See Form 13.)

Free transportation without passes.

42. At the option of carriers, the following designated persons may be given passage, meals and sleeping, parlor, or other accommodations without passes, when in the actual performance of their duties:

Crews of trains, cars, and vessels.
Sleeping car, parlor car, and dining car employees.
Express messengers.
Baggage agents.
Newsboys on trains.

43. In cases of wrecks, epidemics, or other calamitous visitations, persons not prohibited by law from receiving free transportation may be accorded such transportation without passes. In such cases a general statement of the facts must be made by conductors or pursers and filed with reports of passes honored.

44. Passes need not be issued to a carrier's own employees for necessary travel in the performance of their duties in the transportation, maintenance, or construction work of the carrier requiring the movement of employees between points on its line of road, or for travel to and from such duties; provided that in lieu of passes such employees be supplied with checks, uniforms, badges, or other evidence which will establish their identity as bona fide employees entitled to receive passes; and provided further that instructions to recognize the particular means of identification which the carrier adopts be issued to conductors and ticket collectors and included in the carrier's general rules and instructions governing the issuance and use of passes referred to in paragraph 85.

45. Carriers are not required to issue passes for the free transportation wholly within any one municipality of their employees and others not prohibited by law from receiving free transportation; provided that persons so transported are distinguishable by badges, cap emblems, or uniforms indicative of their service.

United States Post Office Department commissions.

46. Commissions issued by the United States Post Office Department may be accepted for the passage of officers and employees of that department when traveling on official business. (See par. 74.)

Transportation of caretakers.

47. Pass forms must not be used for the transportation of caretakers of property. The transportation of caretakers is regarded as revenue transportation, the cost of which is included in the rates covering the charges on shipments for which caretakers are allowed.

48. Caretakers in actual charge of shipments of live stock, poultry, milk, or fruit, and traveling on trains or vessels with such shipments, shall be furnished with no other evidences of their rights to transportation than are contained in shipping contracts, or in identification papers to be used in connection with notations on waybills. If caretakers are permitted under the provisions of tariffs to travel on passenger trains immediately preceding or following shipments, they must be furnished with a form of caretaker's ticket, which must give full waybilling reference and conform to published tariff provisions.

49. If a caretaker's return passage is furnished under the terms of the shipping contract, it shall be provided for either by having the shipping contract executed at destination for return, or by having it lifted and a caretaker's return ticket issued, which must conform to published tariff provisions and show (*a*) the waybill or the shipping contract reference or (*b*) the initials and numbers of the cars, or the name of vessel, the shipping point, and the destination named in the contract.

50. In case shipments of milk are handled on tickets instead of waybills, caretakers' tickets must give full references to dates and numbers of the trains, or names of vessels, on which the shipments move.

51. All collected caretakers' tickets, shipping contracts, and identification papers on which caretakers are carried must be checked against the waybills or waybill records and filed in such manner as to be accessible and convenient for examination.

Extension of time limit of passes.

52. The time limit of a pass may be extended by an indorsement thereon, provided that appropriate record is maintained showing the final limit of passes so indorsed.

53. The time limit of outstanding annual or term passes may be extended, without indorsement, by the issuance of a general notice to that effect. If this is done, a copy of the notice shall be filed with the Commission and a copy shall be filed in the office in which are kept the records of the issuance of passes so extended and shall become a part of the records of passes issued.

Records of passes issued.

54. A complete record of each pass issued must be kept by carriers subject to these regulations. This record must supply information as indicated by the headings on the forms hereinafter prescribed

appropriate for the class of pass to be recorded, and such information must correspond with that appearing on the pass and request. In space provided for "Accommodations, etc.," on the record of annual and term passes issued must be shown all accommodations and services included on pass other than passage, such as drawing room, stateroom, berth, or meals. If passes, prepared for passage only, are indorsed as permitted in paragraph 2 (*c*) to include accommodations in addition to passage, similar indorsement must be made in the record of passes issued; if made on annual or term passes, it must appear in space for "Accommodations, etc.," on Form 10 or 11; if on trip passes, it must also appear on the stub or carbon copy of pass so indorsed.

55. Annual and term passes issued must be recorded on sheets or cards prepared similar to Forms 10 or 11.

56. If Form 10 is adopted, the passes must be entered either in numerical order or in alphabetical order according to the surnames of the persons to whom the passes are issued. When passes are entered in numerical order, an alphabetical index by names shall be maintained; when entered in alphabetical order, a numerical index showing name shall be maintained.

57. If Form 11 is adopted, the cards must be filed either in numerical order or in alphabetical order according to the surnames of the persons to whom the passes are issued. When cards are filed in numerical order, an alphabetical index by names shall be maintained; when filed in alphabetical order, a numerical index showing name shall be maintained. In lieu of the index required in this paragraph, if desired, records on this form may be made in duplicate with one set of cards filed in numerical order and the other set filed in alphabetical order according to the surnames of the persons to whom the passes are issued.

58. The numerical records or indexes referred to in paragraphs 56 and 57 must be kept separately by forms and series of passes; the alphabetical records or indexes may be kept either by forms and series of passes or in one complete alphabetical list for the entire issue.

59. Carriers may, if it is desired, keep an additional record of passes issued entered by departments, carriers, or otherwise, on Forms 10 or 11, but such additional record shall not substitute the complete alphabetical or numerical record or index required in paragraphs 56 and 57.

60. When the numbers of passes issued are shown in strict numerical order on requests received for annual and term passes, such requests may constitute the numerical index required in paragraphs 56 and 57, provided that any numerical index so maintained shall

be complete and shall contain not more than one series of numbers nor more than one form of pass.

61. The record of trip passes issued shall be kept on the stubs or carbon copies of trip passes. Full information must be shown on the stub or carbon copy of each trip pass, as provided on Forms 4, 5, and 6, and this information must conform to the data on the pass and coupon.

62. The record of commuter passes shall be kept on Form 10 or Form 11, if issued in card or book form, or on the stubs, if issued in coupon form with stub. These records must be maintained in the same manner as is provided for annual, term, or trip passes.

63. The record of telegraph passes issued on telegraph blanks shall be kept on Form 12. Such passes may be entered (*a*) in chronological order, (*b*) in alphabetical order according to surnames of persons to whom passes were issued, or (*c*) under departments, carriers, etc.

64. The record of telegraph passes issued on printed forms similar to trip passes shall be kept either on Form 12 or upon the stubs, if issued with stubs. In either event the full information required on Form 12 shall be shown.

65. If a pass is canceled, returned, or lost, the fact must be stated on the record, with the date of cancellation, return, or loss entered.

66. The records of passes issued must be filed in such manner as to be accessible and convenient for examination.

Records of requests on other carriers for passes.

67. Requests on other carriers for passes must be made in duplicate, or legible impression copies must be taken of them, and the duplicates or impression copies must be retained by the requesting carrier and filed in such manner as to be accessible and convenient for examination. When a pass is received, its number must be noted on the duplicate or impression copy of the request.

68. Notices received from other carriers advising of the issuance of passes under the provisions of paragraph 24 shall be filed in the office in which are filed copies of requests on other carriers for passes.

Joint passes.

69. A pass issued jointly by two or more carriers must show, in space provided for "Name of carrier," the names of each of the carriers concerned in such pass, and must also bear the autograph or facsimile signature of an officer named in the list referred to in clause (*a*) in paragraph 3, of each of the carriers interested. If all the signatures of such officers are facsimile signatures, the pass must be countersigned with ink by an officer or responsible subordinate of one of the carriers interested, who must be designated on the face of the pass.

70. If arrangements are made to accept or honor passes issued by other carriers over certain portions of a carrier's lines, such arrangements must be embodied in the pass rules and regulations referred to in paragraph 85, or a statement of the arrangements must be filed with the Commission.

Filing passes.

71. All passes collected and passes spoiled or returned must be filed in such manner as to be readily accessible and convenient for examination.

Reports of passes honored.

72. Reports, showing the use of passes, shall be made in accordance with the provisions of paragraphs 75 to 84, inclusive.

73. Travel performed on transportation certificates or similar authorities issued in accordance with the laws of a State which require designated officers to be accorded free transportation while on journeys entirely within the limits of such State, must be reported in the same manner as travel performed on annual or term passes.

74. Travel performed on commissions issued by the United States Post Office Department must be shown on conductor's or purser's report of passes honored, except when the holder is actually engaged in handling mail on the train or vessel.

Reports of passes honored—Carriers by rail.

75. Conductors or ticket collectors of carriers by rail must make reports of annual and term passes honored for each run on blank similar to Form 18 hereinafter prescribed, or on identification slips, as provided in paragraph 77. If desired, such reports may be combined with reports of revenue passengers, provided the required information is shown. It is optional with carriers by rail whether or not this report shall cover (*a*) passes issued to the employees of the reporting carrier and members of their families, (*b*) passes honored in suburban territory, and (*c*) passes honored for transportation wholly within any one city, town, or municipality. By the term "employees," as here used, is meant the officers and employees devoting substantially all their time to the work or business of the carrier and regularly carried on its pay rolls. By "suburban territory," as here used, is meant the territory adjacent to large centers to and from which there is a regular commuter travel.

76. Trip passes collected on rail lines, except as covered in clause (*a*), (*b*), or (*c*) of paragraph 75, shall in all cases be indorsed or punched so as to indicate the dates and numbers of trains on which used, and in addition thereto:

(*a*) If a trip pass, except as covered in clause (*a*), (*b*), or (*c*) of paragraph 75, is honored for passage between stations other than those named on its face and is collected, the conductor or ticket collector

shall indicate upon it by punch or indorsement the stations between which it actually is used.

(*b*) If a trip pass, except as covered in clause (*a*), (*b*), or (*c*) of paragraph 75, is honored for passage between stations other than those named on its face and is not collected, the conductor or ticket collector shall report the use of the pass on conductor's report, Form 18, or on identification slip, and in the same manner as provided for annual and term passes.

77. The use of identification slips and the form of such slips, if used, are left to the option of carriers by rail. If identification slips are used, and if they show the same information as required by conductor's report, Form 18, they may be substituted in lieu of the conductor's report.

78. Station numbers or letters instead of names may be used on conductors' reports and for indorsements on trip passes provided an official list of the symbols used is kept available for examination.

Reports of passes honored—Carriers by water.

79. Pursers or stewards of carriers by water must make reports of all passes honored and not collected for each trip on blank similar either to Form 20 or 21 hereinafter prescribed. If desired, Form 20 may be combined with the landing or identification check (as used in the collection of transportation at the time passengers disembark) and Form 21 may be combined with the reports of revenue passengers, provided the information required on Forms 20 and 21 is shown. It is optional with carriers by water whether or not these reports shall cover trip passes honored and collected.

80. A trip pass honored and collected, when not included in purser's report of passes honored, must be indorsed or punched by the ticket collector so as to indicate the date and name of vessel on which used, and the points between which used if other than those named on pass, and further, in the event that the pass includes sleeping or other accommodations, the stateroom or other accommodations furnished on the pass shall also be indicated by number or letter.

81. Where locked boxes are used in which ticket collectors deposit all collections as passengers disembark, reports of or indorsements on trip passes, as to date and name of vessel on which used, shall be made by either the ticket collector or by the employee whose duty it is to open and report the contents of such boxes.

82. It is optional with carriers by water whether or not reports shall be made covering passes honored over ferry lines when operated between points of close proximity.

Reports of passes honored—Sleeping and parlor car accommodations.

83. Conductors or ticket collectors of sleeping and parlor cars must make reports for each run of passes on which accommodations have been furnished, on blanks similar to Form 19 hereinafter prescribed or on reports prepared in columnar form, similar to Form 18, with headings to provide for the information required. If desired, Form 19 may be combined with reports of revenue passengers, provided the information required on Form 19 is shown. It is optional with carriers whether or not these reports shall cover trip passes honored and collected.

84. Trip passes collected and not included in conductors' reports of passes honored, must be indorsed or punched by the conductors or ticket collectors so as to indicate the dates on which used, the points between which used if other than those named on pass, the accommodations furnished thereon, the names or numbers of cars, and the route.

Carriers' pass rules.

85. Carriers must file with the Commission on or before January 1, 1917, copies of all their general rules and instructions then in effect governing the issuance and use of passes, if such have not been filed, and forward promptly copies of any subsequent rules and instructions. It is not intended, however, that carriers shall cause to be printed such rules or instructions for the specific purpose of filing them with the Commission.

Pass and record forms.

86. Passes must be issued and records kept substantially in accordance with the forms hereinafter prescribed. Except as provided for elsewhere in these regulations the forms indicate the nature of the information required and the order in which it shall appear. If, however, there is insufficient space on the face of any pass to show all the information required, reference may be made to the back of pass, where it shall be shown.

87. The dimensions of the forms contained in these regulations are not prescribed; however, in order to facilitate the filing of records it is recommended that Forms 16, 17, and 23 be prepared on paper 8 by 10½ inches.

88. Carriers may include any additional matter in the pass forms or record forms, but such additional matter must not be permitted to impair the information required in the prescribed forms or to affect the order in which it is given. The matter printed in italic type in the prescribed forms is not intended to be a part of the form but merely to indicate the nature of the information required.

89. Carriers may adopt additional record forms, but must file with the Commission a list of such forms, showing their use and their purpose, as provided in the Order on page 6.

90. For a special or unusual occasion—such as a convention of an association of railway employees, to attend which its members would use the lines of two or more carriers—when compliance with the foregoing regulations would be needlessly burdensome to the carriers concerned, consideration will be given by the Commission to an application from the initial carrier, made after an agreement with the other carrier or carriers over whose lines it is proposed to issue free transportation, for authority to issue a special form of pass, bearing coupons for the several carriers over whose lines the pass is to be effective.

Form 1.

ANNUAL OR TERM PASS.

FOR PASSAGE ONLY.

1917. (*Name of carrier.*) No. .....

Pass[1].....

Account[2].....

.....

Between[3].....

Until[4]......, 19.... {Unless otherwise ordered and subject to conditions on back.

Valid when countersigned by.....

.....
(*Name and official title.*)

Countersigned by

.....

Form 2.

ANNUAL OR TERM PASS.

FOR ACCOMMODATIONS, MEALS, ETC., BUT NOT INCLUDING PASSAGE.

1917. (*Name of carrier.*) No. .....

This pass entitles[1].....

Account[2].....

.....

To occupy[5].....

Between[3].....

Until[4].....:....., 19.... {Unless otherwise ordered and subject to conditions on back.

Valid when countersigned by.....

.....
(*Name and official title.*)

Countersigned by

.....

See notes relating to Forms 1 and 2 on page 26.

[1] See paragraphs 14, 15, and 16.
[2] See paragraph 17.
[3] See paragraph 19.
[4] See paragraph 20.
[5] See paragraph 18.

Form 3.

ANNUAL OR TERM PASS.

FOR PASSAGE, INCLUDING MEALS, BERTHS, OR OTHER ACCOMMODATIONS.

1917 (*Name of carrier.*) No. .....

Pass [1].....

Account [2].....

.....

Between [3].....

Including [5].....

Until [4]......, 19....{Unless otherwise ordered and subject to conditions on back.

Valid when countersigned by.....

.....
(*Name and official title.*)

Countersigned by

.....

[1] See paragraphs 14, 15, and 16.
[2] See paragraph 17.
[3] See paragraph 19.
[4] See paragraph 20.
[5] See paragraph 18.

NOTES RELATING TO FORMS 1, 2, AND 3:

For annual or term passes to be issued for travel over the entire line or certain portions thereof, the word "between" may be omitted, and in the space provided may be printed "Over entire system," "Over all lines," "Over Eastern Division," etc.

If annual or term passes are to be issued over the autograph signature of an officer, the provision for countersignature may be omitted from such passes.

NOTE RELATING TO FORM 2:

Passes to include meals or accommodations, other than passage, in addition to sleeping or parlor accommodations may be printed "To" instead of "To occupy," so that a pass as issued may read, "To meals and stateroom."

NOTE RELATING TO FORM 3:

Passes may be printed to read "Including meals and berth" or to indicate such other accommodations as are to be included with passage.

Form 4.

TRIP PASS.

FOR PASSAGE ONLY.

(*Name of carrier.*)	(*Name of carrier.*)	(*Name of carrier.*)
No.	No.	No. .....
TRIP PASS STUB.	TRIP PASS.	TRIP PASS.
....., 19..	Pass[1].....	(Subject to conditions on back.)
Pass[1].....	Account[2].....	....., 19..
Account[2].....	.....	Pass[1].....
.....	From[3].....	Account[2].....
From[3].....	To[3].....	.....
To[3].....	Void if detached.	From[3]..... to[3].....
And return.	Issued by.....	Good for one trip only until[4]...
Address.....		....., 19..
Expires[4].....		Valid when countersigned by
Requested by.....		.....
Issued by.....		..... (*Facsimile signature.*)
		..... (*Official title.*)
		Countersigned by
		.....

See notes relating to this form on page 29.

[1] See paragraphs 14, 15, and 16.
[2] See paragraph 17.
[3] See paragraph 19.
[4] See paragraph 20.

Form 6.

TRIP PASS.

FOR ACCOMMODATIONS, MEALS, ETC., BUT NOT INCLUDING PASSAGE.

(*Name of carrier.*)	(*Name of carrier.*)	(*Name of carrier.*)
No.	No.	No. .....
TRIP PASS STUB.	TRIP PASS.	TRIP PASS.
....., 19..	This pass entitles[1]	(Subject to conditions on back.)
Pass entitling[1]	Account[2]	....., 19..
Account[2]	.....	This pass entitles[1] .....
.....	To occupy[5]	Account[2] .....
To occupy[5]	From[3]	.....
From[3]	To[3]	To occupy[5] .....
To[3]	Void if detached.	From[3] ..... to[3] .....
And return.	Issued by	Expires[4] ....., 19..
Address		Valid when countersigned by
Expires[4]		.....
Requested by		.....
		(*Facsimile signature.*)
Issued by		.....
		(*Official title.*)
		Countersigned by
		.....

See notes relating to this form on page 29.

[1] See paragraphs 14, 15, and 16.
[2] See paragraph 17.
[3] See paragraph 19.
[4] See paragraph 20.
[5] See paragraph 18.

Form 6.

TRIP PASS.

FOR PASSAGE, INCLUDING MEALS, BERTHS, OR OTHER ACCOMMODATIONS.

(*Name of carrier.*)	(*Name of carrier.*)	(*Name of carrier.*)
No.	No.	No. .....
TRIP PASS STUB.	TRIP PASS.	TRIP PASS.
....., 19..	Pass [1].....	(Subject to conditions on back.)
Pass [1].....	Account [2].....	....., 19..
Account [2].....	.....	Pass [1].....
.....	From [3].....	Account [2].....
From [3].....	To [3].....	.....
To [3].....	Including [5].....	From [3].....to [3].....
And return.	Void if detached.	Including [5].....
Including [5].....	Issued by.....	Good for one trip only until [4]
Address.....		....., 19..
Expires [4].....		Valid when countersigned by
Requested by.....		.....
Issued by.....		..... (*Facsimile signature.*)
		..... (*Official title.*)
		Countersigned by
		.....

[1] See paragraphs 14, 15, and 16.
[2] See paragraph 17.
[3] See paragraph 19.
[4] See paragraph 20.
[5] See paragraph 18.

NOTES RELATING TO FORMS 4, 5, AND 6:

Trip passes may be provided with a second sheet for carbon copies in lieu of the pass stub. In such cases the carbon copies must be numbered to correspond with the passes, and must show the full information required on the stub.

The trip pass may so be prepared as to permit, by using carbon paper, the filling in of all information required on the stub, the going portion, and the return portion of the pass, by one writing. One coupon of such passes may read "To ..... from .....," instead of "From ..... to .....," as shown on forms 4, 5, and 6.

Trip passes may, if preferred, be limited by a system of dates along the margin, the limits to be indicated by punching or by tearing off dates later than that on which the pass expires.

NOTE RELATING TO FORM 5:

Passes to include meals or accommodations, other than passage, in addition to sleeping or parlor accommodations may be printed "To" instead of "To occupy," so that the pass as issued may read "To meals and stateroom."

NOTE RELATING TO FORM 6:

Passes may be printed to read "Including meals and berth" or to indicate such other accommodations as are to be included with passage.

Form 7.

COMMUTER PASS.

(*Name of carrier.*) No. .....

[1] ..... TRIP PASS.

Pass [2] .....

Account [3] .....

.....

Between [4] .....

Until [5] ....., 19... {Unless otherwise ordered and subject to conditions on back.

Valid when countersigned by .....

.....
(*Name and official title.*)

Countersigned by

.....

[1] See paragraph 2 (*a*) Commuter passes.
[2] See paragraphs 14, 15, and 16.
[3] See paragraph 17.
[4] See paragraph 19.
[5] See paragraph 20.

NOTES RELATING TO FORM 7:

Commuter passes may be issued either in coupon form, with a separate coupon for each ride, or in card form with numbers on the margin, one of which is to be punched for each ride. The card pass, or the last coupon or cover of book (if issued in coupon form), must contain the information indicated on this form.

Electric railways may provide coupons on this form, each of which represents an equivalent in free transportation of a specified amount of fare.

Form 8.

TELEGRAPH PASS.

(See paragraphs 34 to 38, inclusive.)

.....

.....

This telegram, when written in ink and countersigned by you, will pass [1].....

.....from [2]..... to [2].....

account [3].....if used within [4].....days.

.....

(Name of issuing officer.)

[1] See paragraphs 14, 15, and 16.
[2] See paragraph 19.
[3] See paragraph 17.
[4] See paragraph 20.

Form 9.

RECORD OF PASS STOCK RECEIVED AND DISTRIBUTED.

(See paragraph 12.)

DEBIT. Form..... CREDIT.

Stock received.				Stock distributed.					
Date.	Consecutive numbers.		Number.	Date.	Furnished to—		Consecutive numbers.		Number.
	Commencing.	Closing.			Name.	Title.	Commencing.	Closing.	

Form 10.

RECORD OF ANNUAL AND TERM PASSES ISSUED—BOOK RECORD.

(See paragraphs 54 to 66, inclusive.)

Form.....									
Date issued.	No.	To whom issued.			Accommodations, etc.	Territory.	Date of expiration.	Request of—	Remarks.
		Name.	Address.	Account.					

NOTE RELATING TO FORM 10:

Carriers issuing passes for passage only are not required to provide the space for "Accommodations, etc.," on Form 10.

Form 11.

RECORD OF ANNUAL AND TERM PASSES ISSUED—CARD RECORD.

(See paragraphs 54 to 66, inclusive.)

..... Form..... No.....

Name.....

Address.....

Account.....

Accommodations, etc.....

Territory.....

Date of expiration.....

Request of.....

Date issued.....

Remarks.....

NOTES RELATING TO FORM 11:

Carriers issuing passes for passage only are not required to provide the space for "Accommodations, etc.," on Form 11.

In order to facilitate the preparation of such passes and records as are prepared on paper thin enough to secure two legible carbon copies, the records and indexes of passes issued may be made in that manner. In such cases and by preparing record forms sufficiently longer than the pass forms, the information not required on the pass form may be shown at the right of the information which is required, viz: "Address" on the line with "Name"; "Request of" on the line with "Account"; "Date issued" on the line with "Territory"; and "Remarks" on the line with "Date of expiration."

Form 12.

RECORD OF TELEGRAPH PASSES ISSUED.

(See paragraphs 54 to 66, inclusive.)

Date issued.	To whom issued.			From—	To—	Issued by—	Remarks.
	Name.	Address.	Account.				

Form 13.

RECORD OF FREE TICKETS ISSUED.

(See paragraph 41.)

Ticket.			Station from—	Station to—	To whom issued.	Address.	Account.	Amount of fare.	Authorized by—	Remarks, file no., etc.
Date.	Form.	No.								

Form 14.

REQUEST FROM CARRIER'S OFFICERS AND EMPLOYEES FOR PASSES.

PASSAGE ONLY.

(See paragraphs 21 and 22.)

.....Company,

OFFICE OF.....,

....., 191..

.....

.....

.....

DEAR SIR: Please furnish pass for.....

.....

Address.....

Account of.....

From.....

To....., and return.

Limited to.....

([1]).....
(Signature.)

.....
(Title or occupation.)

Approved.

.....

Pass No.[2]..... issued.

[1] See paragraph 27. [2] See paragraph 26.

NOTE RELATING TO FORM 14:
This form may be extended so as to cover two or more passes.

Form 15.

REQUEST FROM CARRIER'S OFFICERS AND EMPLOYEES FOR PASSES.

PASSAGE AND ACCOMMODATIONS, OR ACCOMMODATIONS ONLY.

(See paragraphs 21 and 22.)

.....Company,

OFFICE OF .....,

....., 191..

.....

.....

.....

DEAR SIR: Please furnish pass for.....

.....

Address.....

Account of.....

To occupy.....

From.....

To.....and return.

Including.....

Limited to.....

([1]).....
(Signature.)

.....
(Title or occupation.)

Approved.

.....

Pass No.[2].....issued.

[1] See paragraph 27. [2] See paragraph 26.

NOTES RELATING TO FORM 15:

This form may be extended so as to cover two or more passes.

Requests for passes for passage and accommodations need not be provided with the space "To occupy" on Form 15. (See par. 18b.)

Requests for passes for accommodations only need not be provided with the space "Including" on Form 15. (See par. 18a.)

Form 16.

REQUEST ON ANOTHER CARRIER FOR TRIP PASSES.

(See paragraphs 21, 22, 67, and 87.)

.....Company,

OFFICE OF.....,

....., 191..

.....

.....

.....

DEAR SIR: Will you kindly favor me, on account of this company, with trip pass..for the following person.., who.....not prohibited by law from receiving free transportation: [1].....

.....

Name.....

Address.....

Account of.....

From.....to.....and return.

Limited to.....

This request shall be valid only when countersigned by myself or by.....

My name is on file with the Interstate Commerce Commission.

([2]) .....
(Facsimile signature of officer.)

.....
(Title.)

Countersigned by:

.....

Pass No.[3].....issued.

[1] On requests drawn on other carriers for accommodations, but not including passage, in this space must be shown the character of accommodations requested; as, "to occupy one berth." On requests for passes to include both passage and accommodations, in this space must be shown the character of accommodations and a statement that passage also is desired; as, "to occupy one stateroom in addition to passage."

[2] See paragraph 28.

[3] See paragraphs 26 and 67.

NOTES RELATING TO FORM 16:

The provision for countersignature on Form 16 is not required when such forms are to bear autograph signature.

This form may be extended so as to cover two or more passes.

Form 17.

REQUEST ON ANOTHER CARRIER FOR ANNUAL OR TERM PASSES.

(See paragraphs 21, 22, 67, and 87.)

.....Company,

OFFICE OF.....,

....., 191..

.....

.....

.....

DEAR SIR: Will you kindly favor me, on account of this company, with.....
(*Annual or term.*)

pass....for.....over your line for the following person.., who.....
(*Period or year.*)
not prohibited by law from receiving free transportation: [1].....

.....

Number of pass issued.[2]	Name.	Title or occupation.	Address.	Territory.	Remarks, etc.[3]

This request shall be valid only when countersigned by myself or by.....

My name is on file with the Interstate Commerce Commission.

([4]) .....
(*Facsimile signature of officer.*)

.....
(*Title.*)

Countersigned by:

.....

[1] On requests drawn on other carriers for accommodations, but not including passage, reference must be made in this space to the character of accommodations requested; as, "to occupy space as indicated below." On requests for passes to include both passage and accommodations in this space reference must be made to the character of the accommodations requested and a statement that passage also is desired; as, "to occupy space as indicated below in addition to passage."

[2] See paragraphs 26 and 67.

[3] In column headed "Remarks, etc.," shall be shown the character of any accommodations requested other than passage.

[4] See paragraph 28.

NOTE RELATING TO FORM 17:

The provision for countersignature on Form 17 is not required when such forms are to bear autograph signature.

Form 18.

CONDUCTOR'S REPORT OF PASSES HONORED.

STEAM ROADS AND ELECTRIC RAILWAYS.

(See paragraphs 75 to 78, inclusive.)

(*Name of carrier.*)

Train No..... Date.....

Train run, from.....to.....

.....
(*Conductor or other employee.*)

Punch. ☐

Form or kind of pass.	Pass No.	In favor of—	Honored on this train.		No. persons.	Remarks: Stop-offs, etc.
			From—	To—		

Form 19.

CONDUCTOR'S REPORT OF PASSES HONORED.

SLEEPING AND PARLOR CAR ACCOMMODATIONS.

(See paragraphs 83 and 84.)

(*Name of carrier.*)

Form or kind of pass..... No.....

Car..... Line.....

Accommodations [1].....

From.....

To.....

Date.....

In favor of.....

.....
(*Conductor or other employee.*)

[1] The drawing-room, section, berth, etc., furnished on pass shall be indicated by number or letter.

Form 20.

PURSER'S REPORT OF PASSES HONORED.

CARRIERS BY WATER.

(See paragraphs 79 to 82, inclusive.)

(*Name of carrier.*)

Date [1] .....

Name of vessel [1] .....

Sailing, from [2] ..... to [2] .....

Pass honored on this trip } from ..... to .....

Form or kind of pass .....

Pass number .....

In favor of .....

Number of persons .....

Accommodations, etc. [3] .....

Remarks .....

.....
(*Purser or other employee.*)

[1] Date and name of vessel may be shown on back if dating stamp is used showing such information.

[2] Termini of run may be printed or stamped and the form prepared so as to read, "Between ..... and ....." providing direction of trip is shown, as northbound, eastbound, etc.

[3] Any accommodations included on pass, other than passage, must here be shown. The berths, staterooms, etc., furnished shall be indicated by number or letter.

Form 21.

PURSER'S REPORT OF PASSES HONORED.

CARRIERS BY WATER.

(See paragraphs 79 to 82, inclusive.)

(*Name of carrier.*)

Date.....

Name of vessel.....

Sailing from.....to.....

.....

(*Purser or other employee.*)

Accommodations, etc.	In favor of—	Form or kind of pass.	Pass No.	Honored on this trip.		Number of persons.	Remarks.
				From—	To—		
(1)							
(2)							

[1] The stateroom or berth number may be printed on the form and the required information entered opposite such number.

[2] Any accommodations included on pass, other than passage, must here be shown. The staterooms, berths, etc., furnished shall be indicated by number or letter.

Form 22.

ACKNOWLEDGMENT OF PASSES ISSUED WITHOUT WRITTEN REQUEST.

(See paragraph 24.)

Date.....

.....

.....

.....

Receipt is hereby acknowledged of

....
(*Name of carrier.*) (*Annual or term.*)

Pass No....., in favor of the following person.., who.....not prohibited by law from receiving free transportation:

Name.....

Address.....

Account of.....

Territory.....

Limited to.....

.....

NOTES RELATING TO FORM 22:

This form may be extended so as to cover two or more passes.

Forms 22 and 23 may be prepared so that the two forms and the necessary carbons may be made at one writing.

Form 23.

NOTIFICATION OF PASSES ISSUED WITHOUT WRITTEN REQUEST.

(See paragraphs 24, 25, and 87.)

Date.....

.....

.....

.....

Notice is hereby given of the issuance of

....
(*Name of carrier.*) (*Annual or term.*)

Pass No. ....., in favor of the following person ..., who ..... furnished such transportation without written request from your company:

Name.....

Address.....

Account of.....

Territory.....

Limited to.....

.....
(*Name of officer issuing pass.*)

NOTES RELATING TO FORM 23.

This form may be extended so as to cover two or more passes.

Forms 22 and 23 may be prepared so that the two forms and the necessary carbons may be made at one writing.

[fol. 16] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO REQUIRE THE PRODUCTION OF DOCUMENTS IN POSSESSION OF THE DEFENDANT INTERSTATE COMMERCE COMMISSION—Filed May 17, 1930

Come now the petitioners herein, and pray the Court to make an order requiring the defendant, Interstate Commerce Commission, hereinafter called the "Commission," to produce for the purpose of being introduced in evidence in behalf of the petitioners at the trial of this cause, a document or mass of papers now in its possession, herein referred to as the "record," and hereinafter more fully described, the introduction of which in evidence is material to the cause of action of the petitioners; or, in the alternative, to make an order authorizing and directing the issue of a subpoena duces tecum, directed to the Clerk of the Commission requiring the production of said record at the said trial:

As grounds for the granting of this motion the petitioners respectfully show to the Court:

[fol. 17] I

The said record consists of written answers from three hundred eighty seven carriers of the country to a questionaire sent out to them by the Commission in the manner and for the purpose as follows:

On April 5, 1926, the Commission for the purpose of forming its judgment as to the legality of the free movement of private or office cars over foreign lines of railroad, of its own motion filed its petition or order addressed to all Class I and Class 2 carriers, and to switching and terminal carriers, calling for information for the calender years 1923, 1924 and 1925 as to private passenger train cars owned, leased or operated, the movement or use of such cars as were transported free or at less that tariff rates on home and foreign lines, and the occupants of such cars on respective trips.

The information so sought by the Commission was obtained through answers made by said carriers to a question-aire addressed to all such carriers. A copy of said petition or order is hereto attached, and marked "Exhibit A," and made a part hereof, and a copy of said question--aire is hereto attached, marked "Exhibit B" and made a part hereof. The returns of said carriers to said question--aire, which constitute and make up the record above referred to, were exceedingly voluminous. In bulk they are sufficient to fill a fair size motor truck. By paragraph 13 of Section 16 of the Interstate Commerce Act the said original record is made admissible in evidence, in all judicial proceedings, as prima facie proof of what it purports to be; and certified copies of or extracts from said record are made admissible in evidence with like effect as the [fol. 18] original. A certified copy of said record at prices fixed by law for copies of records, certified by the Commission, will cost in excess of $4,300.00.

II

The Commission upon consideration of said record, on June 21st, 1929, handed down its report (155 I. C. C. 775), containing a summary of the facts contained in the record, and holding that the transportation or movement of private passenger cars, including so-called office cars by one carrier for another or its officials, free or at other than published tariff rates, is contrary to the provisions of the Interstate Commerce Act; and that such practice is unjustly discriminatory and unduly preferential and prejudicial. And on November 4, 1929, the Commission issued its formal order requiring all carriers on or before a specified date to cease and desist from the transportation or movement of private passenger train cars, including so-called office cars of another carrier, free or at other than published tariff rates thereafter to be established.

There is no specific finding that the movement or transportation of legitimate office cars, as hereinafter defined, is illegal, or discriminatory or prejudicial, but the broad language of the Commission's order to cease and desist includes such office cars as well as all other private passenger cars.

III

On February 7, 1930, the petitioners brought the suit herein to enjoin and set aside said order insofar only as it purports to prohibit the free transportation or movement over foreign lines of legitimate office cars occupied by the officers and employees of the owning company and traveling in the interest of or in connection with the opera- [fol. 19] tion of the railroad of said company. After alleging in their petition that for the reasons therein stated the free movement of such office cars over foreign lines is conducted by the transporting company in its capacity of private carrier, as distinguished from its functions and duties of a common carrier, and that such free movement is otherwise permitted by law, the petitioners allege that if the Commission, by including all private passenger cars in its findings, may be said to have found that the practice of moving office cars, as therein and herein described, to be illegal or discriminatory or prejudicial, such finding was unsupported by any substantial evidence before the Commission.

Both the United States and the Commission in their answers herein have denied that such finding is unsupported by substantial evidence; they decline to produce the original record at the trial, but insist that a certified copy thereof must be obtained by petitioners at great expense, and be introduced in evidence by them to prove to the Court, by an examination thereof, that no substantial evidence exists in the record to support such finding; and they contend that, in the absence of the record, or a certified copy thereof, the Court will be compelled to indulge in the conclusive presumption that all the Commission's findings, including the one in question, were fully supported by evidence.

IV

Petitioners allege that the Commission's finding of illegality, prejudice and discrimination, made with respect to the movement of all private passenger cars, was based largely upon the use of such cars by members of the traveling public, and is wholly inapplicable to the movement or transportation of office cars, as herein defined; and they

[fol. 20] deny that any finding was made by the Commission that the movement or transportation of such office cars was or could be prejudicial or discriminatory, and deny that there was any evidence in the record to that effect. They show to the Court that the form of the question-aire, "Exhibit B", was designed to secure information relative to all private passenger cars generally with the purpose of prohibiting any illegal or improper practice that might be disclosed, and was not calculated or intended to elicit information as to office cars as herein defined, and that the Commission's report, 155 I. C. C. 775, including its summary or condensation of the record, does not indicate or intimate that the practice of moving office cars, as herein defined, was contrary to law, or prejudicial, or discriminatory.

Petitioners are confident that the defendants cannot point to any evidence in said record to support a finding that the practice of moving office cars, as herein defined, was prejudicial or discriminatory, and that they will not undertake to do so when the record is produced at the trial. They respectfully show to the court that it is unjust and oppressive under the circumstances to require the petitioners to go to the great expense of producing a certified copy of said record in a case such as this where no cost can be taxed against the Government, and where the record now in possession of the defendant Commission can be produced by it without substantial expense to anyone, if that technical formality should be deemed necessary.

V

Petitioners further state that they have made all reasonable efforts to obviate the unnecessary expense in the production of said record. They have repeatedly offered to [fol. 21] agree, and are now ready to agree, with counsel for the defendants that the summary of the facts in the record contained in the Commission's report (155 I. C. C. 775), which is made by law prima facie evidence of the facts in the record, shall be accepted by all parties in lieu of the production of said record, or a certified copy thereof, and shall be deemed and taken to be the record in this case for all purposes, but counsel for defendants have declined to enter into any agreement of this nature. Pe-

titioners have further endeavored to agree with counsel for defendants upon a narrative statement in simple and condensed form of all parts of the record essential to a decision of the questions presented in this case, but counsel for defendants have declined to consider any effort to agree upon a statement of this character.

Wherefore petitioners pray, in the alternative, as above stated, for an order requiring the production of said record at the trial, or for the issue of a subpœna duces tecum to secure its production at that time.

Frank H. Moore, A. F. Smith, Cyrus Crane, Attorneys for Petitioners. Samuel W. Moore, of Counsel.

Rec'd copy 5-19-30. Wm. L. Vandeventer, by Dorothy L. Connet.

[fol. 22] EXHIBIT "A" TO MOTION

AT A GENERAL SESSION OF THE INTERSTATE COMMERCE COMMISSION, HELD AT ITS OFFICE, IN WASHINGTON, D. C., ON THE 7TH DAY OF DECEMBER, A. D. 1925

No. 17757

In the Matter of the Use of Private Passenger-train Cars

Order

The matter of the use of private passenger-train cars being under consideration:

It is ordered, That the Commission upon its own motion enter upon an investigation into and concerning the use of private passenger-train cars, including so-called office cars, in the transportation of persons by all common carriers of Classes I and II and switching and terminal carriers by railroad within the United States subject to the interstate commerce act, with a view to making such order or orders in the premises as may be warranted by the record.

It is further ordered, That all Classes I and II and switching and terminal carriers by railroad within the

United States subject to the interstate commerce act be, and they hereby are, made respondents hereto, that this order be served upon all such carriers, and that notice of this order be given to the general public by depositing a copy of the order in the office of the Secretary of the Commission at Washington, D. C.;

And it is further ordered, That this proceeding be assigned for hearing at such times and places as the commission may hereafter direct.

By the Commission.

George B. McGinty, Secretary. (Seal.)

[fol. 23] EXHIBIT "B" TO MOTION

INTERSTATE COMMERCE COMMISSION, WASHINGTON

At a General Session of the Interstate Commerce Commission, Held at Its Office, in Washington, D. C., on the 5th Day of April, A. D. 1926

No. 17757

In the Matter of the Use of Private Passenger-train Cars

Supplemental Order

The matter of the use of private passenger-train cars being under consideration.

It is ordered, that each Class I and II carrier and each switching and terminal carrier by railroad within the United States subject to the Interstate Commerce Act, furnish this Commission the information called for in the questionnaire attached hereto, not later than July 1, 1926.

It is further ordered, that a copy of this order be served upon each Class I and II carrier and upon each switching and terminal carrier by railroad within the United States subject to the interstate commerce act, and that notice of this order be given to the general public by depositing a copy of the order in the office of the Secretary of the Commission at Washington, D. C.

By the Commission.

George B. McGinty, Secretary. (Seal.)

[fol. 24] INTERSTATE COMMERCE COMMISSION, WASHINGTON

No. 17757

In the Matter of the Use of Private Passenger-train Cars

Questionnaire

It is desired that each carrier furnish a statement of all Business, Official, or other Private Passenger-Train cars owned or leased, and transported at less than published tariff rates, during each of the years, 1923, 1924 and 1925. Also to furnish statements of all free transportation movements and of all transportation movements at less than published tariff rates of all Business, Official or other Passenger Train Cars for each of the years 1923, 1924 and 1925. These statements to be appropriately classified as provided under questions 2, 3, 4, and 5, which follows:

1. Name of Railroad or System.

2. Statement of Business, Official or other Private Passenger Train Cars owned, or leased, and transported free, or at less than published tariff rates, during the years 1923, 1924 and 1925.

Car		If assigned to whom?	
Initial	Number or name	Name	Occupation
		..	..
		..	

3. Home Cars on Home Railroad.

[fol. 25] Trips made on your own line by the above listed Business, Official, or other Private Passenger-Train Cars owned or leased, and transported free or at less than published tariff rates, during the years 1923, 1924 and 1925.

(a) Car: Initial, Number, or Name.
(b) Left Headquarters of Car (Station).
(c) Date.
(d) For Destination (Station).
(e) Returned to Headquarters (Station).
(f) Date.
(g) Occupants of car.

Name	Occupation	Transportation pass or ticket
		..
		..

(h) Total Mileage of Trip.

(i) Grand Total Mileage of Above Cars for the Years 1923, 1924 and 1925.

4 Home Cars on Home and Foreign Railroads

Trips made on other lines by the above listed Business, Official or other Private Passenger Train Cars owned or leased, and transported free or at less than published tariff rates, including the portion of trips made on respondent's line, during the years 1923, 1924 and 1925.

(a) Car: Initial, Number, or Name

(b) Left Headquarters of Cars (Station)

[fol. 26] (c) Date

(d) Delivered to (Connecting Line) (Station or Junction)

(e) Date

(f) For (Destination)

(g) Via (Route)

(h) Returned to Your line, Via (Route)

(i) Received from (Connecting Line) at (Station or Junction).

(j) Date

(k) Arrived at Headquarters of Car (Station)

(l) Date

(m) Occupants of Car

Name (occupation) Representing

(n) Total Mileage of trips separated as between your own line and on other line or lines.

(o) Grand Total Mileage separated as between your own line and on other line or lines for the years 1923, 1924 and 1925.

(5) Foreign Cars on Home Railroad

Trips made on this line by Business, Official, or other Private Passenger Train cars owned or leased by other lines and transported free by respondent, or at less than published tariff rates, during the years 1923, 1924 and 1925.

(a) Car: Initial, Number, or Name

(If car is not of railroad ownership show name of owner or lessee.)

[fol. 27] (b) Received on This Line from (Railroad)

(c) At (Station or Junction).
(d) Date.
(e) Delivered to Destination, if on this line (Station).
(f) Date.
(g) Delivered to Connecting Line (Railroad).
(h) At (Station or Junction).
(i) Date.
(j) Occupants of Car.

(k) Commissary or other supply items, water, fuel, ice, telephone service or other service items furnished while on your line. Yes or no thereof.

(l) Were these items billed to the occupant, foreign railroad or absorbed by your own line?

(m) Total mileage of trip on your line.

(n) Grand total mileage of other line cars on your line for the years 1923, 1924 and 1925.

(o) Attach copies of forms, reports, statements used in connection with the handling of all Business, Official, or other Private Passenger Train Cars transported at less than published tariff rates.

Oath.

State of
County of

I, (Name of person), the undersigned (Title) of the (Full name of respondent), do, on my oath, declare that the foregoing returns have been prepared by me or at my direction from the books and records of said (Full name of respondent), that I have carefully examined or caused to be examined each and every answer or statements herewith submitted, and that all of said answers and statements are true and correct to the best of my knowledge, information, and belief.

Subscribed and sworn to before me this ___ day of ___, 1926.

made and entered on the 4th day of November, 1929, requiring the plaintiffs and all other carriers subject to the Commission's jurisdiction to cease and desist from transporting private passenger train cars, including so-called office cars, of other carriers, free, or at other than published tariff rates, and to enjoin and set aside a regulation of the Commission, made and entered on the 30th day of July, 1929, prohibiting the issual of var passes, except for cars owned by the issuing carrier, or held by it under lease for use in the service as a common carrier, and except for cars of lines operated as a part of the system of the issuing car[illegible] The validity of the regulation complained of is dependent upon whether or not the Commission had the authority to issue the order of November 4, 1929, referred to.

The order of November 4, 1929, was issued as the result of a proceeding in the so-called Private Passenger Car case, No. 17767, instituted on the Commission's own motion, as authorized by Section 19a of the Interstate Commerce Act. A questionnaire was sent to all Class I and Class II carriers and to switching and terminal carriers, calling for information relative to the movement, handling and use of private passenger train cars, owned, leased or operated on home and foreign lines. Sworn returns were filed by three hundred and eighty-seven carriers of the United States, covering the calendar years 1923, 1924 and 1925. A proposed report was served upon the plaintiffs and upon all other carriers affected, and, within the time allowed, exceptions were filed by the Association of Railway Executives on behalf of its membership, based upon substantially the same contentions as are advanced by the plaintiffs in this proceeding. After a full hearing, the Commission issued its report on June 21, 1929. Its findings and conclusions are summarized in the syllabus of the report as follows:

"1. The transportation or movement of private passenger cars, including so-called office cars, by one carrier for another or its officials, free or at other than published tariff rates is contrary to the provisions of the interstate commerce act.

2. It is unjustly discriminatory and unduly preferential and prejudicial to haul such private cars of other carriers

free, or at less than published tariff rates, while charging certain minimum fares and revenue for the movement of [fol. 34] privately owned or chartered cars.

3. The transportation of persons in private passenger cars, including berth and other accommodations, at the rate charged passengers provided only with ordinary coach accommodations is unjustly discriminatory and unduly preferential and prejudicial."

The exceptants to the report having waived any further hearing, the Commission, on the 4th day of November, 1929, entered the order complained of. The order recites as its basis the findings and conclusions set out in the Commission's report.

The plaintiffs are not complaining of the third finding summarized in the syllabus of the report, and repeated in the order, but profess their willingness to correct the practice therein condemned in a manner satisfactory to the Commission. Their objections are addressed to the findings summarized in the first and second headings of the syllabus, and to the order of the Commission commanding a cessation of the practices therein condemned as illegal. There has been filed as a part of the record in this case the entire record considered by the Interstate Commerce Commission, and the case is before us on final submission.

There is no disagreement as to the facts. The sole question is whether or not the Interstate Commerce Commission, under the law, has the authority to deal with the matters attempted to be dealt with in the order complained of.

The applicable law is found in Section 1(7), Section 22(1), Section 6(1) (7), Section 2 and Section 3(1) of the Interstate Commerce Act, as amended by the Transportation Act of 1920. The pertinent parts of Section 1(7) and Section 22(1) are as follows:

[fol. 35] Section 1(7). "No common carrier subject to the provisions of this chapter, shall, directly or indirectly, issue or give any interstate free ticket, free pass or free transportation for passengers, except to its employees and their families, its officers, agents, surgeons, physicians and attorneys at law; * * * Provided, that this provision shall not be construed to prohibit, the interchange of passes

for the officers, agents and employees of common carriers and their families; * * *"

Section 22(1). "Nothing in this chapter shall prevent the carriage, storage or handling of property free, or at reduced rates, for the United States, State or municipal governments, or for charitable purposes, or to or from fairs and expositions for exhibition thereat, * * * Nothing in this chapter shall be construed to prevent railroads from giving free carriage to their own officers and employees or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employees; * * *"

Section 6(1) requires every common carrier subject to the provisions of the Act to file with the Interstate Commerce Commission, and to print and keep open to public inspection, its schedule of fares and rates for the transportation of passengers and property, and Section 6(7) prohibits any common carrier subject to the provisions of the Act from engaging or participating in the transportation of passengers or property, unless the fares, rates and charges upon which the same are transported by such carrier have been filed and published as provided in Section 6(1), and further prohibits any departure from the published schedules.

Section 2 and Section 3(1) of the Act are as follows:

Section 2. "If any common carrier subject to the provisions of this chapter shall, directly or indirectly, by any special rate, rebate, drawback or other device, charge, demand, collect or receive from any person or persons a [fol. 36] greater or less compensation for any service rendered or to be rendered in the transportation of passengers or property or the transmission of intelligence, subject to the provisions of this chapter, than it charges, demands, collects or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation or transmission of a like kind of traffic or message under substantially similar circumstances and conditions, such common carrier shall be deemed guilty or unjust discrimination, which is prohibited and declared to be unlawful."

Section 3(1). "It shall be unlawful for any common carrier subject to the provisions of this chapter to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic in any respect whatsoever, or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

As shown by its report, the Commission proceeded upon the theory that a private passenger train car or office car of one carrier, when hauled over the line of another carrier, and occupied by an officer or employee of the owning road holding a pass issued by the moving carrier, moves as an article of commerce, and not as a transportation facility of the moving carrier, and that therefore it can not be moved by such non-owning carrier over its line, except in strict compliance with Section 6(1) (7) of the Interstate Commerce Act, hereinbefore referred to. Having reached the conclusion that the movement of such car on the line of a non-owning carrier is the transportation for another of an article of commerce by such carrier, rather than the use by the moving carrier of a transportation facility, the Commission found that its free transportation by such non-owning carrier constitutes an unjust discrimi- [fol. 37] nation, denounced in Section 2 of the Act, and the giving of an undue and unreasonable preference and advantage, prohibited by Section 3 of the Act.

Starting with the premise that a common carrier has the right, under Section 1(7) and Section 22(1) of the Interstate Commerce Act, to exchange passes with other common carriers for their officers, employees and their families, and the further premise that the Interstate Commerce Commission has no authority under the law to control the method or plan by which a carrier acquires its facilities of transportation, the plaintiffs argue that when a common carrier exercises its legal right to issue a pass to an officer or employee of another common carrier, or to members of their families, in exchange for a like courtesy, it has the right to transport such pass holder in whatever appropriate vehicle it may see fit to use; that it may haul such pass holder in one of its own cars, in a leased car, or in a car owned by the carrier of which the pass holder is an officer

or employee, and lent to the moving carrier for the purpose of transporting the pass holder; that from whatever source the car may be obtained, it is a transportation facility of the moving carrier, and not an article of commerce, for the movement of which it must charge the owning carrier the published tariff rate.

The plaintiffs further contend that the provisions of the Interstate Commerce Act, requiring the filing and publication of tariff schedules, and adherence thereto, and the provisions of Sections 2 and 3 of the Act, against unjust discrimination and undue or unreasonable preferences, have no application to persons or property which the law permits to be moved free or at reduced rates.

It is further argued that the alleged long-continued [fol. 34] sanction by the Interstate Commerce Commission of the practice condemned in the order complained of constitutes a binding interpretation of the Act as permitting the practice now condemned, and that Congress in re-enacting the Act's provisions with reference to passes and reduced rates has impliedly adopted such interpretation.

The Commission being a creature of statute, of course has only such powers as are delegated to it by statute and such powers as are implicitly within its delegated powers. It is thoroughly settled that the Commission has no power to control the judgment of the carrier in the matter of its adjuncts to supply itself with the necessary equipment to perform its duties as a common carrier of passengers. It is free to own, lease or borrow its equipment. Chicago, St. Louis & New Orleans R. R. Co. v. Pullman Southern Car Co., 139 U. S. 79; Schofield v. Lake Shore & Michigan Southern Ry. Co., 114 U. S. 615; The Worcester Parlor Car Co. v. Pennsylvania R. R. Co., 95 U. S. 464. Therefore, when a carrier issues to pass to an officer or employee of another carrier, it has the right to perform its contract of carriage of the pass holder in equipment of its own or borrowed or leased equipment. The duty to acquire its equipment, however, does not imply the right to arrange such equipment as to give the pass holder passenger an undue preference or advantage over paying passengers.

It was the purpose of Congress, in enacting the Interstate Commerce Act, to strike down all forms of unjust

discrimination, favoritism and inequality on the part of common carriers in the performance of their duties as such. No common carrier subject to the provisions of the Act has a right to give, and no person has a right to accept [fol. 39] from such carrier, any undue preference or advantage. Any act or practice which may be reasonably construed as an unjust discrimination or as an undue preference or advantage, is undoubtedly a matter within the jurisdiction and subject to the control of the Commission, unless authority for such act or practice can be found in the Act itself. New York, New Haven & Hartford R. R. Co. v. Interstate Commerce Commission, 200 U. S. 361; L. & N. R. R. Co. v. Mottley, 219 U. S. 467. In determining if a particular act or practice is excepted from the provisions of the Act, the Act should not be liberally or loosely construed for the purpose of enlarging the meaning of the exceptions therein contained, but, in view of the cardinal purpose of the Act to prohibit unjust discriminations and unreasonable preferences, all exceptions should be strictly construed, and the words of the exceptions should be given their usual and ordinary meaning.

But for the exceptions found in Section 1(7) and Section 22(1), a railroad carrier subject to the provisions of the Act would have no right to give a pass to any person, and the giving of such a pass would undoubtedly be a violation of Sections 2 and 3 of the Act. The exceptions found in Sections 1(7) and 22 are simply a statutory declaration that the giving of passes by the classes therein named shall not be considered as an unjust discrimination under Section 2, nor as an undue or unreasonable preference under Section 3. However, when Congress authorized the carriers affected by the Act to give free tickets or passes to their own officers and employees and their families, and to exchange with other such carriers passes for their officers and employees, we must assume that Congress used the [fol. 40] words "free ticket", "free pass" and "pass" in the sense that those words are commonly and ordinarily understood. A person a free ticket, as ordinarily understood, requires free transportation in the ordinary way and with the usual conveniences afforded the paying public. To construe the permission to grant free passes and

free tickets, contained in Section 1(7) and Section 22(1), as authorizing not only free transportation of the holder, but transportation in a private car with all the conveniences thereof, would amount to a distortion of the language used and a perversion of the central purpose of the Act. A fair interpretation of the two sections referred to, when they are read in connection with the other provisions of the Act, is that they authorize the giving of free transportation to the persons therein named, with jurisdiction in the Commission to determine if the method of transporting the pass holder, and the conveniences afforded him, constitute an unjust discrimination, prohibited by Section 2, or the giving of an undue or unreasonable preference, within the meaning of Section 3 of the Act.

Construing the Act in this way, it seems to us wholly immaterial whether we view the private or office car, occupied by a pass holder who is an officer or employee of the owning road, as an article of commerce when moving over the line of a non-owning carrier, or as a transportation facility of the moving carrier. If it is an article of commerce, it is being transported free for the benefit of the pass holder; if it is a transportation facility of the moving carrier, it is being furnished free to the pass holder. In either event he enjoys the service thus afforded as a privilege granted by [fol. 41] his pass, and the service and the facilities thus afforded him so far exceed those furnished ordinary paying passengers as to bring the practice clearly within the jurisdiction of the Interstate Commerce Commission.

We are not impressed with the argument of the plaintiffs that inasmuch as there can be no discrimination or preference under the Act except between persons or articles of the same class, preferential treatment of the pass holder can not constitute a violation of the Act. Pass holders and paying passengers are of the same general class—they are all passengers. It costs no more to transport one than the other. The pass holder is lifted out of the provisions of the Act only to the extent that he does not have to pay the usual and ordinary transportation charges exacted of other passengers. In every other respect he is on the same footing as other passengers, and if the facilities afforded him are found by the Commission, upon substantial evidence, to amount to an unjust discrimination or an undue or unreasonable preference, the Commission has the power

under the Act to deal with the matter without interference from the courts.

The plaintiffs suggest that such a construction of the Act would prohibit common carriers from furnishing their officers and employees and the officers and employees of exchanging roads with passes carrying ordinary Pullman accommodations, which practice has always had the sanction of the Commission. It must be remembered, however, that the Act does not denounce every preference or discrimination. What is prohibited is unjust discrimination and unreasonable and undue preferences. We can very well understand how the Commission may consider that the [fol. 42] granting of Pullman privileges to a pass holder is not an unjust discrimination against paying passengers nor an unreasonable preference in favor of the pass holder, and yet hold that to furnish the pass holder with a private car is an unjust discrimination and an undue preference.

Being of the opinion that the Act is clear and unambiguous, the plea of contemporaneous construction and the adoption of that construction by Congress, of course must be rejected. United States v. Missouri Pacific R. R. Co., 278 U. S. 269.

For the reasons stated, we conclude that the practice condemned by the Commission is a matter within its jurisdiction, and, being supported by substantial evidence, we are without power to interfere. Chicago, R. I. & P. Ry. Co. v. United States, 274 U. S. 29; Virginian Ry. Co. v. United States, 272 U. S. 658.

We are not to be understood by what has been here said as holding that the Act confers upon the Commission the power to prohibit a common carrier from hauling its own officers and employees free over its own lines in a private car when they are engaged in the duties of their employment.

A decree conforming to the views herein expressed may be prepared and presented for entry.

May 28, 1930.

Chas. H. Moorman, Smith Hicketlooper, Chas. I. Dawson, Edward S. Jouett, R. V. Fletcher, John J. Cornwell, Robert B. Tunstall, H. N. Quigley, Alfred P. Thom, Alfred P. Thom, Jr., Counsel for Plaintiffs. Daniel W. [fol. 43] Knowlton, Counsel for Interstate Commerce Commission. Elmer B. Collins, Special Assistant Attorney General, for the United States.

[fol. 44] In United States District Court, Western District of Missouri, in the Western Division.

In Equity. No. 1450

The Kansas City Southern Railway Company and Texarkana and Fort Smith Railway Company, Plaintiffs,

v.

United States of America and Interstate Commerce Commission, Defendants.

Final Decree. Filed Sept. 19, 1930.

The above entitled cause come on for hearing upon petition for a temporary and a permanent injunction, and such hearing having been held and the arguments and briefs of counsel for the parties having been heard and considered, and the Court having reached the conclusion, for the reasons set forth in its opinion filed herein on August 27, 1930, which is hereby referred to and made a part of this decree, that the relief prayed in the petition should be denied:

It is, therefore, Ordered, adjudged and Decreed that the relief prayed by the plaintiffs be and the same is hereby denied, and the petition is hereby dismissed for want of equity.

This 19 day of September, 1930.

Kimbrough Stone, United States Circuit Judge. Albert L. Reeves, United States District Judge. Merrill E. Otis, United States District Judge.

[fol. 45] In United States District Court

[Title omitted]

Petition for Appeal by the Kansas City Southern Railway Company and Texarkana and Fort Smith Railway Company—Filed Sept. 19, 1930.

To the Honorable Kimbrough Stone, United States Circuit Judge, and Albert L. Reeves and Merrill E. Otis, United States District Judges:

Now come The Kansas City Southern Railway Company and Texarkana and Fort Smith Railway Company, being the plaintiffs herein, by their solicitors, and feeling aggrieved by the final order or decree of the District Court made and entered herein, on to wit: September 19th, 1930, do hereby appeal therefrom to the Supreme Court of the United States, and they pray that their appeal be allowed and that citation be issued as provided by law.

The particulars wherein they consider the final order or decree erroneous are set forth in the assignment of errors on file, to which reference is made.

They pray that a transcript of the record, proceedings and papers on which the final order or decree was made and entered, duly authenticated, may be transmitted forthwith to the Supreme Court of the United States.

And they further pray that the proper order relating to the security to be required of them be made.

Samuel W. Moore, Frank H. Moore, A. F. Smith,
[fol. 46] Cyrus Crane, Solicitors for Plaintiffs.

[fol. 47] In United States District Court

[Title omitted]

Assignment of Errors—Filed Sept. 19, 1930

The Kansas City Southern Railway Company and Texarkana and Fort Smith Railway Company, plaintiffs and appellants herein, come now by their counsel, and in connection with their petition for appeal, file the following

2. The lower court erred in holding that, because the railway companies of the country had published tariffs requiring a minimum number of tickets for the transportation of chartered or privately owned cars when used by the traveling public generally, such companies thereby became common carriers of office cars of other companies moving over their lines, even when such office cars were occupied by the officers and employes of the company owning the car, traveling on free transportation in the interest of and in connection with the operation of their own road, where such railway companies have never held themselves out by pub-

Wherefore the plaintiffs and each of them pray that the final order or decree of the District Court, entered on, to wit: September 19th, 1930, be reversed, annulled and set aside, with directions that the said orders entered by the Interstate Commerce Commission in its said Docket No. 17756, In the Matter of Use of Private Passenger Train Cars, 155 I. C. C. 775, shall be permanently enjoined, set aside, annulled and held for naught, in part as aforesaid,

and plaintiffs further pray for such other and further order as may be appropriate.

Samuel W. Moore, Frank H. Moore, A. F. Smith, Cyrus Crane, Solicitors for Plaintiffs and Appellants.

[fol. 50] In United States District Court

[Title omitted]

Order Allowing Appeal. Filed Sept. 19, 1930

Upon the entering of the final decree in this cause came Samuel W. Moore and Frank H. Moore, solicitors and counsel for plaintiffs, and filed assignment of errors and petition for appeal, and it is hereby ordered that an appeal by the plaintiffs in the above entitled cause to the Supreme Court of the United States from the decree heretofore filed and entered herein on September 19th, 1930, be and the same is hereby allowed, and that a certified transcript of the record, testimony, exhibits, stipulations, and all proceedings be forthwith transmitted to the said Supreme Court of the United States, said appeal being hereby made returnable thirty days from the date hereof.

It is further ordered that the bond on appeal be and the same is hereby fixed at the sum of Five Hundred Dollars.

Dated September 19th, 1930.

Kimbrough Stone, United States Circuit Judge. Albert L. Reeves, Merrill E. Otis, United States District Judges for the Western District of Missouri.

[fol. 51] In United States District Court

[Title omitted]

Notice of Appeal. Filed Sept. 27, 1930

To the Honorable Stratton Shartel, Attorney General State of Missouri:

You are hereby notified that the plaintiffs in the above entitled case, which is a suit to enjoin, set aside and re-

strain certain orders of the Interstate Commerce Commission in a proceeding before that Commission entitled Docket No. 17757, "In the Matter of the Use of Private Passenger Train Cars," 155 I. C. C. 775, having taken an appeal from the final order or decree made and entered in the district court in the above entitled cause on the 19th day of September, 1930, to the Supreme Court of the United States; and that the order allowing the appeal makes the same returnable within thirty days from September 19th, 1930.

This notice is given to you pursuant to the provisions of the Urgent Deficiencies Act of October 22, 1913 (38 Stat. L. 220, 221).

Samuel W. Moore, Frank H. Moore, A. F. Smith, Cyrus Crane, Solicitors for Plaintiffs.

Service of a copy of the above notice is hereby acknowl-[fol. 52] edged this 25th day of Sept., 1930.

Stratton Shartel, Attorney General of the State of Missouri, by Walter E. Sloat, Asst. Atty. Genl.

[fol. 53] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF LODGMENT OF NARRATIVE STATEMENT OF EVIDENCE IN ACCORDANCE WITH RULE 75 OF THE RULES OF PRACTICE IN EQUITY—Filed Oct. 4, 1930

To the United States of America and Interstate Commerce Commission, defendants and appellees:

You and each of you are hereby notified that the petitioners and appellants, the Kansas City Southern Railway Company and the Texarkana and Fort Smith Railway Company have on this 22nd day of September, A. D. 1930, lodged in the office of the clerk of the said court at Kansas City, Missouri, a condensed statement in narrative form of the evidence taken in this case, including the evidence taken before the Interstate Commerce Commission, which was introduced in evidence in this case; and that a true and correct copy of the said condensed statement is hereto attached for your information.

You are hereby further notified that the appellants herein will on the 9th day of October, A. D. 1930, at 9:30 A. M., or as soon thereafter as counsel can be heard, present such condensed statement in narrative form of the said evidence to the court rendering the decree herein or some judge thereof, either in court or chambers, at the Federal Building at Kansas City, Missouri, and will ask the said court or some judge thereof to approve such condensed statement at which time and place you may appear and be heard if you so desire.

[fol. 54] Samuel W. Moore, Frank H. Moore, A. F. Smith, Cyrus Crane, Solicitors for Appellants.

Service of said notice of lodgment of the said evidence and receipt of copies of the said notice of lodgment of evidence and of the said statement of evidence are hereby admitted and acknowledged upon the dates shown below.

United States of America, by Elmer B. Collins, Sept. 30, 1930. Interstate Commerce Commission, by David W. Knowlton, Sept. 30, 1930.

[fol. 55] IN UNITED STATES DISTRICT COURT

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed Oct. 4, 1930

To the Clerk:

Please prepare a transcript of the record in the above-entitled cause in the matter of the appeal of The Kansas City Southern Railway Company and the Texarkana and Fort Smith Railway Company, petitioners and appellants herein, and include therein in the order given below the following matter together with record of dates of filing thereof, viz:

1. Petition.
2. Answer of the United States of America.
3. Answer of the Interstate Commerce Commission.
4. Notice to require production of documents in possession of Interstate Commerce Commission.

5. Narrative statement agreed upon by the parties and/or approved by the court in evidence introduced at the hearing before the court in this case including evidence introduced before the Interstate Commerce Commission.

6. Notice of lodgment of the said narrative.

7. Opinion of the District Court.

8. Final Decree.

9. Petition for appeal.

10. Assignment of errors.

11. Order allowing appeal.

[fol. 56] 12. Appeal bond.

13. Citation.

14. Notice of appeal to Attorney General of the State of Missouri.

15. All journal entries and orders of court in their proper order.

16. Præcipe for record.

Samuel W. Moore, Frank H. Moore, A. F. Smith, Cyrus Crane, Solicitors for Petitioners and Appellants.

Service of the foregoing præcipe for record and receipt of a copy thereof are hereby admitted and acknowledged upon the dates shown below.

United States of America, by Elmer B. Collins, Sept. 30, 1930. Interstate Commerce Commission, by David W. Knowlton, Sept. 30, 1930.

[fol. 57] IN UNITED STATES DISTRICT COURT

[Title omitted]

PRÆCIPE OF UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS, FOR ADDITIONAL PORTIONS OF RECORD TO BE INCORPORATED INTO THE TRANSCRIPT OF THE RECORD FOR THE UNITED STATES SUPREME COURT—Filed Oct. 8, 1930

To the Clerk of the United States District Court for the Western Division of the Western District of Missouri:

Defendants hereby file this præcipe asking that additional portions of the record be incorporated into the transcript, namely:

The following recapitulations (from the return of petitioners) showing separately for said petitioners the number of trips of their private passenger or other cars (transported free when occupied by passholders), number of occupants holding passes and number holding tickets, mileage covered on home and foreign lines and mileage of foreign cars (transported free when occupied by passholders) on petitioners' lines. The evidence so shown in said recapitulations is to be included in the transcript as in addition to and supplemental to petitioners' "Narrative statement of the evidence in accordance with Rule 75 of the Rules of Practice in Equity" heretofore filed herein.

(Here follow recapitulations, omitted from this).

[fol. 59] Elmer B. Collins, Solicitor for United States. Daniel W. Knowlton, Solicitor for Interstate Commerce Commission.

Service of the foregoing praecipe asking that additional portions of the record be incorporated into the transcript, and the receipt of a copy thereof, are hereby admitted and acknowledged this 6th day of October, 1930.

Frank H. Moore, Cyrus Crane, Solicitor for Petitioners. Samuel W. Moore, of Counsel.

[fol. 60] In United States District Court

No. 1450 In Equity

The Kansas City Southern Railway Company and Texarkana and Fort Smith Railway Company, Petitioners,

vs.

United States of America and Interstate Commerce Commission, Defendants

Narrative Statement of the Evidence in Accordance with Rule 75 of the Rules of Practice in Equity—Filed Oct. 9, 1930

Caption

Be it remembered, That on June 16, 1930, the above entitled cause came on regularly for hearing before the Hon-

[fol. 58] Railroad	Year	Number of private cars	Home cars on home railroad				Home cars on home and foreign railroads			
					Transportation				Transportation	
			Trips	Occupants	Pass	Ticket	Trips	Occupants	Pass	Ticket
Kansas City Southern Ry.)*	1923	4	56	256	253	3	26	112	92	20
Texarkana & Ft. Smith Ry.)*	1924	5	66	308	298	10	33	159	143	16
	1925	6	85	380	365	15	36	169	143	26

Railroad	Year	Mileage			
		Home cars on home roads	Home cars on home and foreign roads		Foreign cars on home roads
			Own line	Other lines	
Kansas City Southern Ry.)*	1923	61,798	12,118	43,147	5,990
Texarkana & Ft. Smith Ry.)*	1924	76,779	16,834	48,110	5,889
	1925	98,571	18,457	50,383	8,089

* Returns made jointly.

Year	Number of private cars	Home cars on home railroad				Home cars on home and foreign railroads				Foreign cars on home railroad			
				Transportation				Transportation				Transportation	
		Trips	Occupants	Pass	Ticket	Trips	Occupants	Pass	Ticket	Trips	Occupants	Pass	Ticket
1923	4	56	256	253	3	26	112	92	20	20	44	42	2
1924	5	66	308	298	10	33	159	143	16	20	47	46	1
1925	6	85	380	365	15	36	169	143	26	29	54	53	1

Year	Mileage			
	Home cars on home roads	Home cars on home and foreign roads		Foreign cars on home roads
		Own line	Other lines	
1923	61,798	12,118	43,147	5,990
1924	76,779	16,834	48,110	5,889
1925	98,571	18,457	50,383	8,089

orable Kimbrough Stone, Circuit Judge, and the Honorable Albert L. Reeves and the Honorable Merrill E. Otis, District Judges. Appearances of counsel; for the petitioners, Samuel W. Moore, Cyrus Crane and Frank H. Moore; for the United States, Elmer B. Collins, its Solicitor; for the Interstate Commerce Commission, Nelson Thomas.

C. E. Johnston, called as a witness by petitioners, being duly sworn, testified as follows:

I am President of The Kansas City Southern Railway Company and have been connected with that company between 23 and 24 years. I have been in the railway service practically all of my life. I am familiar with the custom that has obtained in the United States with reference to the movement of office cars. By office car I mean an office car occupied exclusively by officers and employees and traveling exclusively upon the business of the company. It has been the practice of carriers to move office cars for each other without charge therefor much longer than I can re- [fol. 61] member. As far as I know that has always been the practice up to the time of the making of this order by the Commission.

The uses and advantages of office cars, speaking now for the Kansas City Southern, are many. We have five office cars. The approximate value of the five cars, the average value of the five cars will run between $45,000.00 and $50,000.00 each. They are fully equipped for offices. I mean by that each officer to which an office car is assigned has his office files in the car. He carries supplies, office supplies, carries a secretary, and is equipped to do most all kinds of office work, and in addition to that the cars are equipped for food and for sleeping quarters, so that he is in his office twenty-four hours a day. It is quite true that it is really an office on wheels as the Commission says in this case. Most of our officers conduct more actual office work while on the road in their cars than they can in their offices at headquarters. They do more work there because they are without interruption. As to whether these office cars are or have been continuously in use on the line of the Kansas City Southern daily or practically daily for many years, most every day in the year will find one or more office cars in service on the line of railroad. I would say that they are

a very necessary and play a very important part in the operation of our railroad.

It is necessary upon occasion to move the office cars of the railroad, a railroad like the Kansas City Southern, over foreign lines in connection with the business of the company when the office car is occupied by officers and employes transacting their usual daily business. There are many instances when it means a great deal to the officer who has to move to other centers in connection with his business to [fol. 62] have with him his office. For instance, our Eastern headquarters are in New York, our Board of Directors meets in New York, and we have monthly meetings. I am President of the company and attend many of those monthly meetings. I am also a director, sit on the Board, and it is a very necessary thing, particularly in connection with the budgets, by budgets I mean the program of expenditures and budgeting of expenditures, or any important plans that you desire to present to the Board, that you have not only the records in the case, but you have facilities available so that you can change up those records when you get to New York headquarters. In that respect, the office cars equipped as they are on trips of that kind, are quite necessary. As to whether, if you use an office car, you take along your blue prints and all your files and records and stenographic assistants, and work continuously during the time of your trip to New York and back again, the facility is available for you to work continuously if you desire to do so. You sometimes do so. This is also true with reference to trips other officers of the company may be required to make. The Chairman of our Board, who is a director, makes trips from New York to the line. He makes them once a year anyway, usually in the spring of the year, and with him he brings other directors. They bring their correspondence that has accumulated during the year relating to the matters they wish to investigate while they are on the line, and an office car in a movement of that kind is almost a necessity, by reason of the fact that the subjects are so numerous and varied, so great in character, that it is almost necessary to have a car to bring the records in. A berth or compartment, or a drawing room, in a regular train, would not accommodate to any degree of satisfaction or efficiency, our blue prints and office files and equipment [fol. 63] we would have to take along in order to conduct

our ordinary daily work. As to whether, in addition to going from Kansas City to New York and back and from New York to Kansas City and back, as above described, there are other occasions where I deem it essential for myself or other officers to travel over foreign lines in an office car, an office car is a great time saver for an officer handling property. For instance, we have a great many meetings in Chicago, meetings called to discuss rates, meetings called to discuss labor schedules, and meetings called for many other purposes, and the same is true of meetings in St. Louis. We are rather unfortunate in Kansas City in having the headquarters here of but one of the trunk railroads, so to speak. The Kansas City Southern is the only road that has its headquarters in Kansas City. For that reason, many meetings are called in Chicago because it is headquarters for several lines, and in St. Louis because St. Louis is headquarters for several lines. Seldom ever is a meeting called for Kansas City because of the fact that we have but one headquarter, that is, the Kansas City Southern, in Kansas City. These meetings in various places are to meet with the executive officers say of the other companies, to discuss not only the business of our company but the business of the territory in which our company is interested. You desire to attend those meetings and you desire to save as much time for the company as it is possible. The meeting is called say for Chicago. You desire to attend that meeting and you have an appointment on your line of railroad at Shreveport, Louisiana, the day after, or at the earliest possible moment after you can attend this meeting in Chicago. To come around by Kansas City and get to Shreveport, Louisiana, it takes as a rule an additional day, and to go directly from Chicago to Shreveport through St. Louis you save a day, and in those [fol. 64] short moves of that kind, that is the short cuts between points of that kind, means much, a considerable saving in the officer's time, that is, by going on those trips in an office car with the office equipment saves your time. And it enables you while away from your headquarter at Kansas City to transact your business at any time or at all times during your absence, because you have your office —a sufficient part of your office with you, to enable you to do that. These office cars have been moved by other carriers in the past gratuitously, as a matter of courtesy or

reciprocity, reciprocal accommodation. In the past when we undertake to make an arrangement to move an office car over a foreign line we address the officer of the foreign line something like this: "if entirely consistent, will you kindly arrange movement of car so and so between such points". In some instances, if you are in a hurry to get to your particular destination and ask for a certain train, they will come back and say that train is overloaded at the present time, and it isn't consistent to move your car on that train, but there will be a train, number so and so, following within thirty minutes or an hour, we would be glad to move your car on, or we have a fast mail train not scheduled, an extra mail train, leaving at a certain hour that we would be glad to handle your car on. As to whether, if we make a request on them, they may grant it or they may not, and if they do grant it they may grant it upon such conditions as may tend to meet their convenience, it has always been the understanding if we ask them to move a car it is entirely in their hands whether they should move it or not. And if they would say, "We cannot move your car," then it means [fol. 65] that the car remains at home. We don't undertake to move it over that particular line. Or they may say, "Yes, we will move it but we will designate the train and place in the train where it shall go." They have always reserved that particular right. I would say that what I have told about the Kansas City Southern and its officers is fairly typical of other carriers of the country so far as I can judge. I think that is generally true. Mr. Collins objected to the last question and answer for the reason that this suit was brought by the Kansas City Southern to preserve its rights and not being brought on behalf of any other carriers.

The office cars are not moved under tariffs, but simply under some individual arrangement made in each case. We have no tariffs or have never had as far as I know tariffs covering movement of office cars. The company has never held itself out by tariffs or by advertisements or in any way as a common carrier of office cars.

Judge Stone: It seems that all of you gentlemen agree upon the essential fact but you don't like the conclusions that may be drawn by the witness. Can it be conceded or be a fair inference that the Kansas City Southern has

never applied for or published the tariff or held itself out to the public—by that I mean by circulars or any other way telling what it is going to do—covering office cars, unless that term by proper construction should be included in the term private cars?

Mr. Thomas: Yes, I think that is the actual fact, that is the term "private car" as stated in the tariffs which are on file.

The Court: Yes.

Mr. Moore: Of course, the whole purpose of this proceed-[fol. 66] ing is to compel the railroad to publish tariffs for office cars. I think that is a pretty strong indication there are none now.

Mr. Johnson: If the Commission's order is enforced, and we are prevented from moving cars on foreign lines, the Kansas City Southern will be deprived to a certain extent of the use of its private cars to which it has put them heretofore. If the tariff rates that are now applicable to chartered cars are put into effect, then I would say positively there would be very little riding on the foreign lines by our officers. That would be absolutely prohibited. In any event the use of our private cars would be very much restricted.

It is very helpful and convenient to the officers to have the private cars to make these trips on official business in the operation of the railroad. It saves their time, enables them to work en route in greater convenience than if they were in a drawing room, for instance, in an ordinary Pullman car. They have with them so many more office facilities than they could possibly have with them in a drawing room or a Pullman car. They have desks and tables, file cases and map cases in an office car. Those are all conveniences. As to whether that same convenience, all that same necessity of which I have spoken, would apply equally as well in the case of any business man who had to travel about the country, I would think if he could have a way of carrying his office with him, it would. There are a great many business men at the present time that pay the tariff rates of private cars to handle their business. They can afford to do it they think. As to whether the railroad official gets the same convenience free, I can't say that you

can say it is free because we extend the same courtesy to [fol. 67] the other line. I don't mean that we haul the car of another line exactly the same number of miles that they haul our car. There is no way to equalize the mileage. I understand that if we pay the tariff rate, the same as any other private car, that the Commission's order does not prohibit making trips by our cars on foreign lines. I don't mean to say that the officers of our road could not ride in ordinary Pullman cars like other passengers. They do. When they are off the line not in office cars they ride in Pullmans as a rule. I understand that the Kansas City Southern is still free to transport its office cars on the lines of other carriers if they pay a published tariff rate, pay for the transportation.

I am not prepared to say what might be considered a reasonable charge would enable us to operate our office cars freely to get the fullest benefit of them. No doubt under any application of a charge there would be some use by the office car, but the restricted use that may come from a rate that would be regarded too great for us to pay, to what extent that would be restricted, I am unable to say.

As to whether the use of office cars on our line is almost continuous every day, we have some of our cars on the line practically every day. The use of one of our office cars on a foreign line would not be every day. It would only be occasionally, not at any regular intervals, but as the meetings or as appointments of the line would dictate. Judging from that past, a maximum use we would make of our private cars or office cars on foreign lines would be three times a month. I would say that would be the maximum use. The occasions when we would use our office cars upon foreign lines, say three times a month, I would regard as [fol. 68] essential and necessary uses in the business of our company.

As to whether I stated on direct examination that there were no methods for the accounting of the mileage given or received with regard to our company's private office cars, I didn't mean to say that, at least I would say that there was no effort made to equalize the mileage made by our cars on foreign lines with the mileage made by their cars on our lines. Records are kept of the movement of all cars on our lines. There is an exact record kept of all

cars moved by all railroads so that you can get any mileage information you desire.

Petitioners next introduced in evidence a duly certified copy of the entire record of the Interstate Commerce Commission in No. 17757—In the Matter of the Use of Private Passenger Train Cars—in which the order complained of in the petition was entered.

The case was tried in this court on the testimony of Mr. Johnston and on the facts detailed in the report of the Interstate Commerce Commission (155 I. C. C. 775) as to what the practices of the carriers were. These facts, so detailed, the petitioners did not controvert, but they contended that, assuming them to be true, the Commission did not have lawful authority to enter so much of its order based thereon as prohibits one railroad subject to the Interstate Commerce Act from moving free, or on such terms as the interested carriers may be able to agree upon, the office car of another such railroad company when occupied by the officers and employees of such other company, entitled to and holding free transportation over the line of the transporting carrier, and traveling upon or in connection with the operation of such other company's railroad properties.

From the record of the Commission above referred to, [fol. 69] it appears that a questionnaire was sent by the Commission to all Class I and Class II carriers and switching and terminal carriers, calling for information as to private passenger train cars owned, leased, or operated, the movement or use of such cars as were transported free or at less than tariff rates on home and foreign lines, and the occupants of such cars on the respective trips. Returns or answers thereto were filed under oath by 387 carriers covering the calendar years 1923, 1924 and 1925.

The only evidence appearing in the record before the Commission was the returns or answers of the various carriers to this questionnaire. These answers covered many thousands of pages of statistical data, differing in details but being practically the same in substance. These returns or answers were correctly tabulated by the Commission, its tabulation being shown in Appendices A, B, C, D, E, F, G and H attached to the Commission's report in this case. The returns or answers sustained the statements of fact

made and detailed in the Commission's report and in its appendices as to what the practices of the carriers were. An official pamphlet copy of this report and the appendices is hereto attached as a part hereof. The returns and answers further showed that the illustrations of the different phases of the practice of transporting private passenger train cars, including so-called office cars, shown by the particular instances set forth in the text of the report and in Appendices C, D, E, F, G and H, were illustrative and typical of the practices of the carriers named in the Commission's order. The facts so stated and detailed in the Commission's report and its appendices (such particular instances being so regarded as illustrative and typical) constitute a full and complete statement, in simple and condensed form, of all the evidence or facts which were [fol. 70] contained in the record before the Commission on which it entered the order complained of in this case.

As appears from the order of the Commission herein, which is hereby made a part of this statement of evidence, the defendant carriers waived any further or additional hearing before the Commission to that which had been given prior to said order.

No part of the evidence in the case before the District Court, except as above stated and herein condensed, given orally and also contained in the record of the proceeding before the Interstate Commerce Commission, was pertinent, material or essential to the decision of any question presented on this appeal, and, accordingly, pursuant to the provisions of Equity Rule 75, all of it except what is herein contained is omitted.

Frank H. Moore, Cyrus Crane, Solicitors for Appellants. Samuel W. Moore, of Counsel.

14716

INTERSTATE COMMERCE COMMISSION

No. 17757

IN THE MATTER OF USE OF PRIVATE PASSENGER TRAIN CARS

Submitted March 14, 1929. Decided June 21, 1929

1. The transportation or movement of private passenger cars, including so-called office cars, by one carrier for another or its officials, free or at other than published tariff rates is contrary to the provisions of the interstate commerce act.
2. It is unjustly discriminatory and unduly preferential and prejudicial to haul such private cars of other carriers free, or at less than published tariff rates, while charging certain minimum fares and revenue for the movement of privately owned or chartered cars.
3. The transportation of persons in private passenger cars, including berth and other accommodations, at the rate charged passengers provided only with ordinary coach accommodations is unjustly discriminatory and unduly preferential and prejudicial.

Thomas P. Healy for Interstate Commerce Commission.

Alfred P. Thom, Alfred P. Thom, jr., and *R. H. Aishton* for Association of Railway Executives.

W. H. Lyford for Chicago & Eastern Illinois Railroad Company.

Report of the Commission

McManamy, *Commissioner:*

Exceptions to the proposed report were filed on behalf of the Association of Railway Executives and the Chicago & Eastern Illinois Railroad Company and oral argument has been had.

This is an investigation instituted on our own motion into and concerning the use of private passenger-train cars, including so-called office cars, in the transportation of persons, with a view to making such order or orders in the premises as may be warranted.

A questionnaire was sent to all Class I and II carriers and to switching and terminal carriers, calling for information as to private passenger-train cars owned, leased, or operated, the movement or use of such cars as were transported free or at less than tariff rates on home and foreign lines, and the occupants of such cars on respective trips. Returns were filed, under oath, by 387 carriers, covering the calendar years 1923, 1924, and 1925.

The returns to the questionnaire were so voluminous and the subject matter so diversified that a complete detailed analysis thereof is

impracticable within the limits of this report. Different phases of the subject have been considered generally and particular practices and instances cited as illustrations.

The returns show that a substantial portion of the total mileage of private passenger-train cars, including so-called office cars, herein referred to collectively as private cars, was on the lines of carriers other than those owning the cars. The private cars thus moved over foreign lines were transported without charge. In other words, a pass was issued covering transportation of the private cars similar to that issued for the transportation of certain classes of persons as provided for in sections 1 and 22 of the act.

A general summary of the data included in the returns to the questionnaire is contained in Appendix A, which shows separately for Class I roads, Class II roads, and for switching and terminal roads the number of private passenger cars owned or leased, number of trips, number of occupants holding passes, and the number holding tickets. In Appendix B is contained a statement, by roads, of the mileage of private passenger cars during the years 1923, 1924, and 1925 on home and foreign lines, also of the mileage of foreign cars on home lines. The data submitted by carriers covering movement of foreign cars on home lines do not in some cases agree with the data submitted by the owning carrier covering mileage of cars on foreign lines. These discrepancies are, however, of little importance and no attempt was made toward correction thereof.

It will be understood that a private car includes a kitchen, dining room, staterooms, and observation or sitting room, together with storage space and sleeping quarters for the cook and attendants. The facilities thus provided for those traveling in private cars excel the facilities of the ordinary coach or Pullman car.

The returns to the questionnaire show that the occupants of private cars are not restricted to officials and employees of the carriers but include in a large number of cases the families, relatives, and friends of railway officials traveling on passes or on tickets that would in most cases entitle them only to transportation in the ordinary coach. The following instances, which refer to movements of private cars of other carriers over the lines of the Atlantic Coast Line, Atchison, Topeka & Santa Fe,[1] New York Central, and Union Pacific, will illustrate the practices in these respects. The parties indicated were in charge of the cars.

[1] Hereinafter referred to as the Santa Fe.

	Miles
On the Atlantic Coast Line:	
1. Wife of director	664
2. Wife of director	1,327
3. Wife of chairman of board	3,000
4. Wife of vice president	54
5. Wife of president	108
6. Wife of senior vice president	340
7. Wife of vice president	651
8. Wife of vice president	389
9. Wife of vice president	108
10. Wife of chairman of board	274
11. Widow of deceased president	1,327
12. Daughter of chairman of board	631
13. Wife of general superintendent	155
14. Wife of vice president	464
On the Santa Fe:	
1. Wife of president	2,242
Car deadhead, Los Angeles, Calif., to Chicago, Ill	2,227
2. Widow and son of deceased vice president	2,242
3. Widow of deceased director	1,129
4. Widow of deceased president	2,006
Car deadhead to Kansas City, Mo	1,791
Car deadhead, Chicago, Ill., to Los Angeles, Calif	2,260
5. Widow of deceased president	2,260
6. Wife of president	2,242
Car deadhead, Los Angeles, Calif., to Chicago, Ill	2,242
7. Wife of vice president	1,919
Car deadhead, Los Angeles, Calif., to Kansas City, Mo	1,790
8. Widow of deceased director	1,705
9. Widow of deceased president	3,795
Car deadhead, Los Angeles, Calif., to Kansas City, Mo	
10. Wife of chairman of board	2,225
On the New York Central:	
1. Wife of president	812
2. Wife of director	876
3. Widow of deceased director	438
4. Widow of deceased director (in privately owned car.)	1,314
5. Wife of vice president	858
6. Wife of vice president	592
7. Wife of chairman of board	284
8. Wife of president	662
9. Wife of director	961
On the Union Pacific:	
1. Wife of director	1,550
2. Wife of president	2,522
3. Widow of deceased chairman of board (in privately owned car)	1,980
4. Wife of vice president	507
5. Widow of deceased vice president	2,434
6. Wife of executive vice president	1,980
7. Wife of chairman of board	990

On December 9, 1925, Chicago, Rock Island & Pacific car No. 1911 left Chicago, Ill., for Los Angeles, Calif., and return. This car was occupied by the general freight agent of the carrier and by the vice

president of the Studebaker Corporation and wife, together with four children and a maid. The mileage of this trip totaled 4,594 miles. On November 8, 1925, the same car traveled from Chicago to Champaign, Ill., over the Illinois Central and was occupied by the system freight-traffic manager of the carrier, who traveled on a pass, and by 15 other persons holding tickets. The returns to the questionnaire show that "most of these parties were engaged in the coal business."

On May 15, 1925, Pittsburgh & Lake Erie car No. 99 moved over the Louisville & Nashville from Louisville, Ky., to Cincinnati, Ohio. The car was in charge of the assistant to the president, and accompanying him were the following guests using tickets:

Vice president and wife, Standard Steel Spring Company.
President and wife, Schenango Furnace Company.
Official and wife, Severance Manufacturing Company.

There is also a substantial use of private cars, both on home and foreign lines, by directors of carriers. For example, Appendix C shows movements of private cars occupied by directors of the Pennsylvania Railroad. Trips of less than 200 miles on foreign lines are not included nor are trips between Pennsylvania Railroad points such as Chicago and St. Louis, Mo., via the Chicago & Alton included.

Attention is called to the record of movements of private cars occupied by or assigned to a vice president of one of the eastern carriers, which is shown in Appendix D. The same official is an executive of several other carriers in different parts of the country.

During the three-year period the eight private cars of the New York, Chicago & St. Louis [2] traveled 254,814 miles on foreign lines, while foreign-line cars traveled only 26,693 miles on that line. An analysis of the movements of these eight cars on trips involving both home and foreign lines is contained in Appendix E. These trips included trips to Florida, California, Michigan, Maine, French Lick Springs, Ind., Hot Springs, Ark., and White Sulphur Springs, W. Va. Included among the occupants in numerous instances were the wives of officials and in other instances the parties included guests holding tickets.

The movement of private cars to resorts commonly patronized by those seeking recreation or amusement, and located on foreign lines, is very noticeable. For example, the total mileage of private cars of other carriers over the Atlantic Coast Line leading to Florida during the three-year period was 456,683, and over the Richmond, Fredericksburg & Potomac was 227,312. In considering this figure it is to be borne in mind that the latter line is only 116 miles in length. The return of the Maine Central shows that the mileage of foreign private cars over that line was 41,521, which is almost twice the mileage of

[2] Hereinafter referred to as the Nickel Plate.

Maine Central private cars on its own line. During the same period private cars of the Maine Central were moved only 2,028 miles over other lines.

There is also an extensive use of private cars by short lines, industrial roads, and lines owned, controlled, or used in the interest of some particular business. The mileage of private cars used by the latter lines is largely on foreign lines, and in numerous instances the home stations of the cars and the movements thereof are so far removed from the vicinity of the owning road that it is difficult to conceive the circumstances under which such movements could have been in the interest of or connected with the operation of the road owning the car. For example, the private cars of the Interstate Railroad made 4,296 miles on home lines and 21,544 miles on foreign lines; the cars of the Louisiana & Pacific made 167 miles on home lines and 61,046 miles on foreign lines, including travel for the account of the Longview, Portland & Northern; the cars of the Midland Terminal made 113 miles on home lines and 19,027 miles on foreign lines; the cars of the Minneapolis, Northfield & Southern made 160 miles on home lines and 15,058 miles on foreign lines; and the cars of Piedmont & Northern made 2,000 miles on home lines and 73,888 miles on foreign lines.

As a further illustration, attention is called to the situation disclosed with respect to the Louisiana & Pacific. This was one of three sawmill roads which composed the so-called Shreveport, Alexandria & Southwestern system, 91 miles in extent. The roads were owned and operated as subsidiary companies by the Long Bell Lumber Corporation, which has mills and plants in various sections of the country. According to Poor's and Moody's Manuals the following Long Bell Corporation officials are also officers of the subsidiary railways: Chairman, president, two vice presidents, and the secretary and comptroller. The carriers' replies to questions 2 and 3 of the questionnaire are reproduced in order to show clearly the cars and assignments:

Question 2. Statement of business, official, or other private passenger-train cars owned or leased and transported free or at less than published tariff rates during the years 1923, 1924, and 1925.

Car		If assigned, to whom
Initial	Number or name	
L. & P. Ry. Co.	Kymokan	Unassigned. These cars were owned by Louisiana & Pacific Railway Company which, with the Sibley, Lake Bisteneau & Southern Railway Company and the Woodworth & Louisiana Central Railway Company comprise the "Shreveport, Alexandria & Southwestern Railway System." The cars were used jointly by general officers of these system lines and also by general officers of the Mississippi Eastern Ry. Co. and Longview, Portland & Northern Railway Company, some of whose officers and directors are also officers and directors of the "Shreveport, Alexandria & Southwestern Railway System" lines.
L. & P. Ry. Co.	100 (Previously Kymokan sold May 8, 1924.)	
L. & P. Ry. Co.	101 (Acquired from L. P. & N. Ry. Co. July 15, 1924.)	

Question 3. Home cars on home railroad.

None. Headquarters of car located off line. Explanation: The business car of these lines is held at Kansas City, Mo., at which point are located the general offices of respondent.

These cars with home station at Kansas City, Mo., the headquarters of the Long Bell Corporation, made 167 miles on home lines and 61,046 miles on foreign lines, while these roads were used for a total of 60 miles by private cars of foreign lines. Most of the trips were made between Kansas City and Longview, Wash. There were several so-called inspection tours which embraced Mississippi, Louisiana, and Texas destinations. The home-line mileage on these trips ranged from 5 to 88 miles and the foreign-line mileage ranged from 2,500 to 2,559 miles. A list of ticket passengers on the trips of this system's cars, together with the advantages accruing to the families of the officials, indicates the real purpose of the cars. Included among the ticket passengers are the following Long Bell Lumber Corporation officials and employees:

Vice president.
Secretary to vice president.
Assistant to vice president.
General manager of Longview farm and wife.
Sales manager of sash and door department.
Manager of mercantile department.
Mill manager.
Second secretary to vice president.
Superintendent of construction.
Third secretary to vice president.
Clerk in mercantile department.
Treasurer and wife.
Architect.
Landscape architect.
Advertising manager.
Chief clerk.
Mill superintendent.

The returns show 65 passages on passes and 55 on tickets. Various members of the families of officials, including maids and valets, comprise a large portion of the travelers on both pass and ticket transportation. A statement of the movements of Louisiana & Pacific private cars on the Union Pacific was taken from the latter's return and is included as Appendix F.

The returns with respect to the Nevada Northern also illustrate how a small road with several private cars and with important noncarrier interests makes use of the private car. This road according to Poor's and Moody's Manuals operates 165 miles of broad-gage line in Nevada. The road is owned by the Nevada Consolidated Copper Company, which is controlled by the Utah Copper Company, which in turn is controlled by the Kennecott Copper Corporation. The same interests own or control the Copper River & Northwestern Railway in Alaska. Officers and directors of the Nevada Northern are officers or directors in one or more of the related corporations, namely: Copper River & Northwestern Railway, Nevada Consolidated Copper Company, Utah Copper Company, and Kennecott Copper Corpora-

tion. The return of the Nevada Northern shows that the road owns two private cars; one, the N. N. 101, has headquarters on the line at East Ely, Nev., while the other car, N. N. 100, is identified in the returns as follows: "Note: Home station of Nevada Northern 100 is Jersey City, N. J. (Erie Railroad)." This car was used extensively by the president of the Nevada Northern and by the president and vice president of the Copper River & Northwestern. A third car, which was moved extensively on the account of the Nevada Northern, is the car "Cyprus," which, according to the return, is owned by a vice president of that railway. The extent of the travel of cars charged to the Nevada Northern on the Western Pacific, Southern Pacific, and Union Pacific is shown in Appendix G.

The return shows that in most instances the owner of the "Cyprus" traveled as vice president of the Nevada Northern, but at other times he traveled as an official of the Bingham & Garfield. The return of the Ray & Gila Valley in referring to movements of the same official's car, "Cyprus," stated: "We have kept no record of the movements of * * * car on own line and were, therefore, delayed since receipt of your second request in searching out the dates of his semi-annual visits to the property in Arizona." This return also showed with respect to occupation that the official referred to "is the president and active executive in charge of operations of the Jackling-Hayden-Stone group of copper mines and subsidiary railways."

The returns show that a substantial portion of the total mileage of private cars, especially on foreign lines, was what is commonly referred to as "deadhead" mileage, that is, the cars were not occupied, except in some instances by an attendant. The purpose of such movements is to return the cars to their home stations or to move them to stations where they are to be occupied. On the Baltimore & Ohio and the Michigan Central approximately 3 per cent of the total mileage of foreign private cars was deadhead. On the Cleveland, Cincinnati, Chicago & St. Louis the percentage was 4, on the Santa Fe it was 5, on the Boston & Maine over 9, on the New York Central over 11, on the Richmond, Fredericksburg & Potomac over 12, and on the Atlantic Coast Line over 16.

The returns show numerous instances where private cars were deadheaded to and from off-line shops without charge. Also worthy of consideration is the matter of free switching service and free storage for private cars. A large number of the private cars covered by the returns are held at off-line stations when not in use. Many are so held at New York and the returns indicate that the matter of storage and switching of these cars is of considerable importance from the standpoint of operating expenditures.

In numerous cases cars were rented from the Pullman Company by officers of carriers, and such cars were moved without charge by the carriers. The movements of Pullman private cars occupied by railway officials and others over the Union Pacific and New York Central are summarized in Appendix H.

Numerous instances are shown where private cars of the carriers were loaned to officers of other carriers. As an illustration, Missouri Pacific car No. 1 was loaned on May 15, 1925, to the chairman of the board of the Manufacturers Railway for a trip from St. Louis to Louisville. The returns show that this official used a pass and that he was accompanied by seven persons holding tickets. Union Pacific car 101 was used for a trip from New York to Colorado Springs, Colo., during July and August, 1923, and was occupied by the widow and daughter of a former director, holding passes, and by five other persons holding tickets.

Many private cars which were transported free, or at less than tariff rates, are of private ownership as distinguished from carrier ownership. For example, Union Pacific car No. 1900 is owned by the widow of a former chairman of the board of one of the western carriers. Attention is called to the movement of this car during the period from July 16 to September 5, 1923, as indicated below:

July 16, 1923.	Ogden, Utah, to Oakland Pier, Calif	---
July 16, 1923.	Oakland to San Francisco, Calif	Deadhead
July 17, 1923.	San Francisco to Santa Barbara, Calif	---
July 30, 1923.	Santa Barbara to Los Angeles, Calif	Deadhead
July 31, 1923.	Los Angeles to Santa Barbara, Calif	Deadhead
Aug. 14, 1923.	Santa Barbara to Los Angeles, Calif	---
Aug. 15, 1923.	Los Angeles to Santa Barbara, Calif	---
Aug. 29, 1923.	Santa Barbara to Los Angeles, Calif	---
Aug. 29, 1923.	Los Angeles to Santa Barbara, Calif	Deadhead
Sept. 1, 1923.	Santa Barbara to San Francisco, Calif	---
Sept. 1, 1923.	San Francisco to Oakland Pier, Calif	Deadhead
Sept. 5, 1923.	Oakland Pier, Calif., to Ogden, Utah	---

The private cars of railroad officials are intended to be offices on wheels for those whose duties require considerable travel over the line and when used for that purpose are an important facility for carrying on the business of the road. It is seldom, however, that these duties necessitate a movement of the car over other lines. In some cases such a movement may be justified for business reasons; for example, where it avoids a very circuitous haul over the home line. But the returns to our questionnaire indicate that private cars are often used for other than business purposes by railroad officers, their relatives, and friends. Moreover, they appear to be used in some instances for the benefit of an industry which controls the railroad. In other instances, their use in entertaining shippers may be for the purpose of obtaining business for the railroad. These

and other abuses are apparent from the returns, but we are here concerned primarily with the legality of the free transportation of the private cars of other carriers. We will, therefore, proceed to a consideration of the law applicable to the subject.

A passenger-train car is property. The provisions of the interstate commerce act relating to free transportation of passengers and property are contained in sections 1 and 22. In *American Express Co.* v. *United States*, 212 U. S. 522, the Supreme Court considered the question of whether common carriers could lawfully issue any—

> frank or other documents for the free transportation of property to the following persons, to-wit: The officers, agents, attorneys, and employees of said defendant and their respective families; the officers and employees of other express companies and their respective families; the officers and employees of any railroad or any other common carrier subject to the act to regulate commerce and its amendments, and their respective families.

An injunction had been issued by the lower court restraining the issuance of such franks and from transporting or forwarding for the persons above named, without demanding and receiving the lawful rate of payment therefor, any shipments of property subject to the provisions of the interstate commerce act and its amendments.

It was contended in that case that the custom of the express companies to issue such franks was one of long standing and presumably known to Congress; and that there was no record of any protest against it to or by this commission, or to Congress, nor any suggestion in any speech or report that it was supposed to be detrimental to the public interest, or that it was intended to be prohibited. On the other hand, it was contended for the United States that the only section of the interstate commerce act which relates to the carriage of property free or at reduced rates is section 22, and that there is nothing in it which by any possible construction can be taken as covering the granting or interchanging of franks, applying to the transportation of property by the express companies.

In disposing of the case and in affirming the decrees of the lower court the Supreme Court said:

> We are clearly of the opinion that, without doing violence to the language used in section one—including the proviso—its terms can not be held to include the transportation of goods.

The question was again presented in *Legality of Express Franks*, 50 I. C. C. 599, 603. There we said:

> The free carriage either of persons or of property is contrary to the general principles to be found in the act to regulate commerce, as amended. See sections 2, 3, and 6. The same principle is asserted even more strongly in the legislation accompanying the act itself and which was enacted in aid of its enforcement and for the punishment of those who offend its provisions. Any free carriage of passengers that is now lawful is authorized in the form of exceptions to the general

principle to be found in the so-called antipass provision of section 1 of the act. Any free carriage of property that is lawful is to be found in the exceptions noted in section 22 of the act. While the free carriage of certain of the excepted classes of passengers has thus been authorized even when traveling for pleasure or for their personal benefit, the spirit of the whole act forbids the free carriage of property except where public interests are involved under the conditions specified in section 22.

This decision was reaffirmed in *Legality of Express Franks*, 69 I. C. C. 627, decided July 10, 1922. The findings as to express companies in these respects are applicable to other carriers.

Any free carriage of property that is lawful is to be found in the exceptions noted in section 22 of the act. Compare *Int. Com. Com.* v. *Balt. & Ohio R. R.*, 225 U. S. 326; *Arizona Rates, Fares and Charges*, 61 I. C. C. 572; *Pacific Engineering & Construction Co.* v. *C., R. I. & P. Ry. Co.*, 56 I. C. C. 247. Section 22 provides in part that:

* * * Nothing in this Act shall prevent the carriage, storage, or handling of property free or at reduced rates, for the United States, State, or municipal governments, or for charitable purposes, or to or from fairs and expositions for exhibition thereat. * * *. Nothing in this Act shall prevent any carrier or carriers subject to this Act from giving reduced rates for the transportation of property to or from any section of the country with the object of providing relief in case of earthquake, flood, fire, famine, drought, epidemic, pestilence, or other calamitous visitation or disaster, if such reduced rates have first been authorized by order of the commission (with or without a hearing); but in any such order the commission shall define such section and shall specify the period during which such reduced rates are to remain in effect.

The principal opposition to the proposed report came from the Association of Railway Executives. It is argued on behalf of this association that the free carriage of railway officials and employees authorized by the act includes a private car of another line occupied by one or more of them. In support thereof it is urged that such free carriage is universally recognized as not confined to the persons but includes their baggage, although baggage is property and the act does not specifically authorize its free transportation.

Baggage is usually transported without charge in addition to the passenger's fare, subject to certain restrictions as to weight and other matters. It is obvious that a person can not travel without certain property, such as clothing, and the transportation of this property is merely incidental to the transportation of the passenger. While the transportation of baggage may be spoken of as free, it is in reality covered by the passenger's fare. The property which may thus be transported without separate charge is defined in the tariffs, and when the weight permitted is exceeded separate charges are provided. Naturally, a person traveling on a pass is generally accorded the same baggage privileges as other passengers, and apparently he would have to pay the same charges as others on excess weight. There are other

limitations on the property which may be transported as baggage without separate charge; for example, such charges are often provided on bicycles and baby carriages. Recently certain carriers have provided for the checking of automobiles in baggage service at stated charges, which would apparently have to be paid whether the passenger is traveling on a pass or ticket. Such charges for the checking of certain articles are no doubt made because most passengers do not travel with these articles, and they are not considered ordinary or necessary baggage. In other words, their transportation is not such an ordinary and necessary incident to the transportation of the passenger as to require or warrant their transportation without additional charge. While the transportation of a private car may be in a sense incidental to the transportation of the persons riding therein, the use of such cars is certainly not so general that they may be considered an ordinary or necessary incident to the transportation of the passengers, as in the case of baggage. It seems clear from the foregoing that the free transportation of a private car can not be justified upon the same principle as the transportation of baggage.

As a matter of fact, the baggage tariffs specifically prohibit the checking of numerous articles which are commonly included in private cars, such as chinaware, foodstuffs, and furniture. Not only that but such articles beyond question would be subject to charges if shipped by freight or express. It is strange indeed if a railroad official is entitled to have articles transported free in a private car which could not be checked and would be subject to charges if shipped in any other manner. Surely if a person riding on a pass must pay to check a bicycle or automobile, the principle of free baggage can hardly be invoked in favor of a private car. A person riding on a pass is not entitled to have anything transported free which is not covered by the fare paid by any other passenger.

In our view it is too far-fetched to say that because a person lawfully entitled to use a pass may have transported free a limited amount of baggage he may also bring and have transported free a private car embracing a kitchen, dining room, stateroom, sitting room, and necessary equipment, supplies, and attendants. According to the views advanced on behalf of the railway executives the family, relatives, and friends of the official or employee in charge of the private car being transported free may without objection likewise be accommodated therein. And when the car is no longer needed it may, under their interpretation, be sent over foreign lines to its home station without charge, or if the car is at its home station and is desired elsewhere on foreign lines for use it may be brought without expense. Free transportation is contrary to the general policy of the act and the definiteness and clarity with which Congress has specified the

extent to which free transportation may be afforded by carriers subject to the act precludes the construction which counsel would have us place upon the pass provisions thereof.

The argument of the Association of Railway Executives that the carriers may lawfully haul the private cars of other lines without charge is also predicated on the theory that such a car is an instrumentality of commerce rather than an article of commerce. We are thus brought to a consideration of the question of when railway equipment generally may be transported without charge. Of course, a carrier may transport its own property without the payment of tariff charges. It would serve no useful purpose to require a carrier to transfer money from one pocket to another in payment of charges. Likewise, property which a carrier has hired or rented for the performance of its common-carrier duties may be transported the same as property which it owns. It is well known that freight cars and to some extent passenger cars move freely over foreign lines, and it may be helpful to consider the terms on which such cars are handled.

Freight cars in service are generally interchanged between the principal carriers throughout the country under rules of the American Railway Association. The carrier in possession of the car pays the owning line a certain amount for each day the car is on its line. This is referred to as per diem and is in the nature of rent for the use of the car. It is paid whether the car is loaded or empty, as the empty movement is considered incidental to the loaded movement, and the carrier in possession may permit an empty car to be loaded with revenue freight. This use of the freight cars of another carrier relieves the carrier in possession of the burden of furnishing its own equipment, which is a distinct benefit, and it participates in the revenue from the freight. Freight cars in regular service are not subject to transportation charges but such cars are subject to charges when the transportation is not in regular service. The consolidated classification provides certain charges per car per mile for the transportation of all kinds of railway equipment on their own wheels. For example, dining, parlor, and sleeping cars are charged from 23 to 30 cents per mile in the various territories. These charges apply on new cars moving from the place of manufacture to the home line before being placed in service, also on cars moving empty to and from repair shops off the home line, and on any other movements over foreign lines not in regular service. Apparently a car is in service when it is under load or has carried a load and is returning or seeking another load. In other words, so long as a car is being handled for revenue purposes, it is in service and not subject to charges; but when it is transported solely for the benefit of the owning line, the latter must pay for such transportation on another line.

Privately owned freight cars are also used by the carriers in transporting property of the owners. An allowance of so much per mile is paid by the carrier to the owner for the use of the car. This is based on the empty as well as the loaded movement, but if the empty movement exceeds the loaded movement the mileage allowance on the excess must be refunded, and in addition charges are assessed for the transportation of the car. Otherwise, no charge is made for the handling of a privately owned car in service, as its use benefits the carrier and is for revenue purposes. The charges in the consolidated classification for the transportation of cars not in service apply to privately owned as well as carrier equipment, no distinction being made because of private or carrier ownership.

Passenger cars of one carrier are sometimes operated over the lines of other carriers in maintaining through service. The terms on which this is done are a matter of contract, but in the absence of other arrangement the owning line is paid certain amounts per mile or per diem under rules of the American Railway Association. As in the case of freight cars, no charges are assessed for the handling of cars in service, but cars not in service are subject to the charges in the consolidated classification. The criterion for determining when a passenger car is in service would seem to be the same as in the case of a freight car; that is, whether the car is being handled for revenue purposes in the interest of all the carriers in the through route or solely for the benefit of the owning line.

Special, privately owned, or chartered cars for the exclusive use of special parties are transported in passenger trains under tariffs which provide for certain minimum revenues. In the case of sleeping and parlor cars, charges for a one-way movement are based on the authorized fare for each passenger, with a minimum of 25 adult fares, but not less than $42 for the car and party. The charges for a round-trip movement are similar, except the 25 fares are doubled or must be for the round trip, and the minimum revenue is $84. In either case, the surcharge must be paid for each passenger, with a minimum of 25 surcharges, but this is not used in computing the minimum revenue per car. When a car is moved empty or in charge of porter or other attendants, charges are assessed on the basis of 10 regular adult one-way fares, plus the authorized fare for each porter or attendant, except not more than three employees of common carriers may be carried free. In this case also the minimum revenue is $42, including fares of attendants, but the surcharge is not collected. In some of the tariffs the charges for empty movements apply to carrier-owned as well as privately owned equipment. The tariffs also provide for application of the minimum fares and revenue on carrier-owned cars equipped for certain special purposes, such as advertising,

exhibition, instruction, and the like. These are the provisions generally in effect, although there may be variations on individual lines.

The term privately owned cars is not defined in the tariffs, but its obvious meaning is cars owned by others than the carriers. Apparently a private car owned by an individual even though a railroad official would be subject to the tariff charges on privately owned cars. It would seem that if a railroad official must pay to have his own car moved, the free transportation of his person authorized by the act could hardly be deemed to include a private car owned by his company.

It will be seen from the foregoing that tariff charges are provided for the transportation in freight trains of both carrier and privately owned cars of all kinds, when they are handled solely for the benefit of the owner and not for revenue purposes. It would not be seriously urged that such transportation could be rendered free if an attendant or other person having a pass should ride in the car. The tariffs also provide minimum charges for the transportation in passenger trains of special, privately owned, or chartered cars for the exclusive use of special parties. Apparently these minimum charges would not be lessened or affected in any way if a person or persons having passes should ride in the car. All of these charges show that there is nothing in the nature of railway equipment which justifies its transportation without charge, except when it is being handled for revenue purposes in the interest of the carrier performing the service. Even then the revenue from a passenger car used exclusively by a special party must be sufficient to warrant its transportation.

The propriety of tariff charges for the movement of railway equipment on its own wheels has been recognized by us in numerous cases. In two of them in fact we found that the charges assessed on freight cars were applicable even though they were transported under load. *Pacific Engineering & Construction Co.* v. *C., R. I. & P. Ry. Co., supra; McCloud River Ry. Co.* v. *S. P. Co.*, 56 I. C. C. 287. Although charges are not generally assessed on cars under load, the charges assailed in the cases cited were upheld on the ground that the carriers had never agreed to accept the cars in interchange service. It was recognized that loaded cars are presumed to have been accepted in interchange service, but this presumption was found to have been overcome under the circumstances of these cases. Stated in another way, the charges were found applicable because the carriers had not hired the cars and they did not pay the usual mileage allowance for their use. In a more recent case we found that the charges assessed on certain cars hauled under load were not applicable because the cars had been accepted in interchange service and the mileage allowance was paid for their use. *Haffner Thrall Car Co.* v. *N. P. Ry. Co.*, 146 I. C. C. 47. The theory underlying these decisions is that a carrier may not assess

charges on a car which it has hired the use of, but it may and should assess charges when it has not hired the use of the car even though it is hauled under load.

The transportation of a private car of another carrier is ordinarily for the benefit of the owning line or its officials and not for revenue purposes. While ticket passengers may sometimes occupy such a car, they do so by invitation, and the carrier performing the transportation is not at liberty to make use of the car by putting other passengers in it. The returns to our questionnaire indicate that it is seldom, if ever, that the number of ticket passengers is sufficient to make the hauling of the private car of another carrier profitable to the carrier performing the service. This is further indicated by the additional fact that such passengers apparently do not pay the surcharge, which is assessed on persons riding in Pullman and privately owned or chartered cars. Indeed, the few ticket passengers sometimes riding in the private car of another carrier could probably be accommodated in other equipment that must be hauled anyhow, and the transporting carrier would receive more revenue if they rode in an ordinary Pullman car. Under these circumstances a carrier hauling the private car of another line can not be said to have hired its use, as it would have no interest in doing so and pays no rental therefor. Even if car hire should be provided on private cars, it would obviously be a mere subterfuge which could not change the legality of the practice. Our conclusion is that the transportation of the private car of another carrier is not of such advantage to the carrier performing the service as to warrant its performance without charge, on the same principle as the free handling of revenue-producing equipment.

The Association of Railway Executives asserts that the carriers have always hauled the private cars of other lines without charge, that this practice has been well known to the commission, and that we have expressly approved it. It is contended, therefore, that we have interpreted the act as permitting the practice, and cases are cited to the effect that such an administrative interpretation is entitled to considerable weight where it is long continued and uniform.

In support of this contention it is pointed out that our conference ruling No. 95 and our pass regulations of 1917 both prescribed a form of pass for railway officials and employees which included the word "car." Of course, such a pass would be proper for the movement of a home-line private car, and it is understood that the practice is to issue passes for such cars, at least on some lines. But the Association of Railway Executives urges that the form of pass prescribed applied to foreign-line cars, since it provided for naming the carrier, which was not required in the case of a pass for the officers or employees of

the home line. The form of pass does not specifically indicate whether it is for home or foreign-line cars or both. It might in fact be construed as including any kind of a car, even though subject to tariff charges. Under these circumstances we think that the pass form should be given a construction in harmony with the law. Certainly we never intended to approve the practice of issuing passes for the private cars of other lines. However, our conference rulings have all been canceled, and our pass regulations will be amended so as to make clear that a car pass may be issued only for home-line cars.

It is also argued that where our pass regulations refer to passes for sleeping, parlor, *and other accommodations*, the words in italic include a private car of another line. We think those words were meant to cover such similar accommodations as a stateroom or berth on a steamer. A private car of another line can not be regarded as an accommodation furnished by the carrier issuing the pass. We do not see how the words in question can be given the construction sought.

Our attention is not directed to any decision of a formal or informal nature in which we have approved the practice of handling private cars of other lines without charge, and diligent search has failed to disclose any such decision. In two cases we referred to the use of "car and party" passes by officers of so-called tap lines or industrial lines as being improper and unlawful. *The Tap Line Case*, 23 I. C. C. 277, 298; *Colorado Free Pass Investigation*, 26 I. C. C. 491, 494. The only other case in which any consideration has heretofore been given to the free transportation of private cars was *The Five Per Cent case*, 31 I. C. C. 351. At page 410 of that report we referred to revenue which the carriers might have derived by charging tariff rates on private cars handled free. In effect we told the carriers that they should look to this among other means of increasing their revenues, but apparently they have not heeded our recommendation. The lawfulness of the practice was not brought in issue and was not passed upon in that proceeding. Clearly we have never ruled that private cars may lawfully be transported without charge for other carriers or their officials.

It may be assumed that the practice of hauling the private cars of other lines without charge prevailed at the time of the passage of the act to regulate commerce. That, however, does not indicate an intention on the part of Congress to permit the practice, since, as stated in our third annual report, the law aimed at the correction of the abuses of free transportation. Nor can the long existence of the practice of issuing passes for foreign-line private cars be regarded as legalizing it. As previously stated, in *American Express Co.* v. *United States*, *supra*, the Supreme Court held that an express company

could not lawfully issue franks to certain classes of persons for the transportation of property, notwithstanding the contention that the custom of issuing such franks was one of long standing and no protest against the practice had been made to or by the commission. This is the first time that the lawfulness of the practice of issuing passes for foreign-line private cars has been brought in issue before us. Of course, good faith might be urged in defense of past violations, but obviously it could not be so urged in respect of a violation after the law has been construed by this commission.

It is urged that while the practice of transporting foreign-line private cars without charge is lawful our investigation has shown that the courtesy extended as between roads has in some instances been abused. It is proposed to correct such abuses by the adoption of a code of ethics limiting such courtesies and calling for reports to be rendered covering the movement of private cars on foreign lines. Counsel stresses the point that although the practice of transporting private cars without charge is of long standing we have not declared it unlawful. As previously stated, this is the first time the legality of the practice has been before us for decision. Apparently it is the first time the practice has been given serious consideration by the Association of Railway Executives since only after our investigation were the abuses of what they term a lawful courtesy discovered. There is no more reason for construing our failure to declare the practice unlawful as approving the practice, than there is for construing the failure of the executives to correct the long-existing abuses as approving them. After observing our finding that the transportation of private cars over foreign lines should be paid for through the assessment of a just and reasonable charge the executives will still have a duty to perform in eliminating unnecessary use of private cars and in thereby promoting efficient and economical management as contemplated by the act.

The Chicago & Eastern Illinois was the only carrier which filed exceptions to the proposed report. It urges that the assessment of charges for the movement of private cars over foreign lines would handicap it in the solicitation of traffic in the Southeast and Southwest. This line is a part of through routes to and from points in those territories which it can reach only over the rails of its connections, while certain competitors such as the Illinois Central and the Santa Fe extend all the way to many of the important southeastern or southwestern points. Apparently the Chicago & Eastern Illinois has been sending its private cars over the lines of its competitors as well as other carriers for the purpose of soliciting traffic in their territory. It is not clear why the use of private cars is so important in the solicitation of traffic, which is ordinarily handled by traffic

representatives, such as this line has at various points in the Southeast and Southwest. During the three years covered by our questionnaire, the private cars of the Chicago & Eastern Illinois traveled 28,274 miles on foreign lines, while it hauled the private cars of other carriers 44,223 miles. The assessment of reasonable charges for such movements would, therefore, have been to the advantage of this carrier.

Reciprocity between carriers is no justification for the free transportation of private cars. It will be observed that railway equipment generally which is not in revenue service is not handled on that principle, and it could not be so handled lawfully. Moreover, the returns to our questionnaire show that there is seldom a fair balance between the service performed by different carriers in transporting the private cars of each other. On the contrary, the returns show that there is often a wide difference in the relative amount of service performed in hauling such cars. No one has contended that the theory of reciprocity warrants the free handling of private cars. Transportation must be paid for in cash and not in commodities or services. *In re Contracts for Free Transportation*, 16 I. C. C. 246; *United States* v. *C. I. & L. Ry. Co.*, 163 Fed. 114; *Louisville & Nashville R. R. Co.* v. *Mottley*, 219 U. S. 270.

As heretofore pointed out, the tariffs provide certain minimum fares and revenues for the movement of special, privately owned, or chartered cars, which are evidently intended to cover the service of transporting the car. This is apparent from the fact that the charges are the same whether the car is occupied by 1 passenger or 25. Especially in the case of cars moving empty or in charge of porter, it is manifest that the minimum fares and revenue are intended to compensate for the movement of the car rather than its contents. Apparently the only material difference between the cars on which these minimum charges apply and the private cars of other carriers is the matter of who owns or is using them. In so far as these charges do not apply to the private cars of other carriers, they are unjustly discriminatory and unduly preferential and prejudicial. See *In the Matter of Restricted Rates*, 20 I. C. C. 426, wherein it was found in violation of sections 2 and 3 to charge less for the transportation of railway coal than the rates charged on commercial coal. This decision was upheld by the Supreme Court in *Int. Com. Com.* v. *Balt. & Ohio R. R.*, *supra*.

We find that the transportation or movement of private passenger cars, including so-called office cars, by one carrier for another or its officials, free or at other than published tariff rates is contrary to the provisions of the interstate commerce act. The assessment of a just and reasonable charge by carriers transporting private cars for others, and for services rendered in connection therewith, is not

only required by the act but will be in keeping with efficient and economical management.

This finding does not extend to the point of saying that it is unlawful for private cars of one carrier to be transported over the lines of other carriers, but is confined to the assertion that under existing law the transportation of private cars on foreign lines should be paid for through the assessment of a just and reasonable charge.

As shown in Appendix A, a substantial percentage of the occupants of private cars hauled free, or at less than tariff rates, were business associates, relatives, or friends holding tickets which entitled them only to transportation in the ordinary coach. A total of 22,391 passenger-miles were traveled by such persons in private cars of the Nickel Plate and a total of 208,203 passenger-miles were traveled by such persons in private cars of the Chicago, Rock Island & Pacific during the three-year period. The returns of other carriers show similar travel.

Carriers according passengers the comforts and facilities of private cars, including berth and other accommodations, are treating unequally and unfairly the passengers accorded the ordinary coach facilities but who are charged at the same rate as those traveling in private cars, and they also discriminate against those who pay the surcharge for riding in ordinary sleeping or parlor cars and privately owned or chartered cars.

It is provided in section 2 of the act:

> That if any common carrier subject to the provisions of this Act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property or the transmission of intelligence, subject to the provisions of this Act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation or transmission of a like kind of traffic or message under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

It is also provided in paragraph 1 of section 3 of the act:

> That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

The Association of Railway Executives urges that the question of whether it is unjustly discriminatory and unduly prejudicial to furnish private-car accommodations to invited guests without charge

depends upon the circumstances of each individual case. They seem to think that circumstances may warrant the furnishing of a berth and other accommodations in a private car without charge, provided only that the passenger has purchased a ticket entitling him to passage. We are unable to see how a berth or other accommodations for which a tariff charge is usually made can be furnished free any more than a passenger can be carried without charge. A carrier which furnishes free a berth or other accommodations in a private car similar to those for which tariff charges would be assessed if the passenger rode in a Pullman car is clearly guilty of violating section 6 of the act.

It is suggested that the furnishing of a berth or other accommodations in a private car is merely a courtesy extended by one passenger to another. The furnishing of a berth or other accommodations in a Pullman or private car without charge to a person not lawfully entitled to free transportation is just as clear a violation of the spirit and plain intent of the act as carriage without the purchase of a coach ticket.

The railway executives further urge that a hearing must be held in each individual case to determine whether the circumstances and conditions are so similar as to warrant an order requiring the removal of the discrimination and prejudice. This argument sounds like that made by the carriers soon after the passage of the act to regulate commerce. It was contended then that a difference in circumstances and conditions warranted the issuance of passes to certain classes of persons, such as public officials. That contention was rejected in *In Re Persons Free or at Reduced Rates by B. & M. R. R. Co.*, 5 I. C. C. 69, 78; and *William H. Harvey* v. *Louisville & Nashville R. R. Co.*, 5 I. C. C. 15.

One of the fundamental purposes of the act is "to compel the carrier as a public agent to give equal terms to all" and "to cut up by the roots every form of discrimination, favoritism, and inequality." *New Haven R. R.* v. *I. C. C.*, 200 U. S. 361; *L. & N.* v. *Mottley*, 219 U. S. 467; *U. S.* v. *Union Stock Yard*, 226 U. S. 286.

We further find that the transportation of persons in private passenger cars, including berth and other accommodations for which a charge is made in Pullman cars, at the rate charged passengers provided only with ordinary coach accommodations is unjustly discriminatory, unduly preferential of the former, and unduly prejudicial to the latter as well as those who pay the surcharge for riding in ordinary sleeping or parlor cars and privately owned or chartered cars.

The carriers will be expected to cease and desist from the violations of the act herein found, but in view of the penalties provided for such violations, no order appears to be necessary.

BRAINERD, *Commissioner*, dissenting in part:

The majority's decision is based upon information obtained by the commission from returns made to a questionnaire sent to Class I and II carriers. No hearing has been held and no opportunity for the introduction of evidence or the examination or cross-examination of witnesses has been granted. This report is adopted over the carriers' exceptions based in part upon a failure to accord them a full hearing. While I concur in much if not all that is said by the majority, I do not wish to be understood as approving the practice of adopting formal reports containing findings of fact or conclusions of law based upon an investigation, whether upon our own motion or otherwise, without having first held a hearing at which all parties have been afforded an opportunity to introduce evidence and examine and cross-examine witnesses in such manner as may be necessary to conform to the requirements of due process of law. The more liberal the practice, the more imperative the obligation to preserve the essential rules by which rights are determined.

I am authorized to state that COMMISSIONERS WOODLOCK and PORTER concur in the views herein expressed.

APPENDIX A

Recapitulation

	Number of private cars	Home cars on home railroad				Home cars on home and foreign railroads				Foreign cars on home railroad					
		Trips	Occupants	Transportation		Trips	Occupants	Transportation		Trips	Occupants	Transportation		Cost of commissary and other supply items furnished while on own line	
				Pass	Ticket			Pass	Ticket			Pass	Ticket	Absorbed by own line	Absorbed by occupant or foreign railroad
Class I roads:															
Year 1923	817	18,003	40,372	39,014	1,358	3,208	8,150	7,409	741	8,212	17,482	15,859	1,623	$2,857.66	$19,979.46
Year 1924	840	18,658	41,376	39,833	1,543	3,707	9,052	8,026	1,026	8,931	19,408	17,572	1,836	3,836.19	17,000.99
Year 1925	816	19,460	44,648	42,680	1,968	3,891	10,388	9,324	1,064	9,906	21,344	19,042	2,302	3,054.74	19,350.33
Total, Class I roads	.....	56,121	126,396	121,527	4,869	10,806	27,590	24,759	2,831	27,049	58,234	52,473	5,761	9,748.59	56,330.78
Class II roads:															
Year 1923	44	174	341	320	21	111	251	221	30	141	352	309	43	22.50	15.84
Year 1924	41	184	335	321	14	128	329	291	38	167	451	417	34	16.00	84.09
Year 1925	445	162	308	308	.....	126	292	265	27	295	463	431	32	31.25	6.48
Total, Class II roads	.....	520	984	949	35	365	872	777	95	513	1,266	1,157	109	69.75	106.41
Switching and terminal roads:															
Year 1923	4	2	2	2	.....	12	37	37	.....	333	439	432	7	833.32	3,567.91
Year 1924	4	3	32	32	.....	14	38	38	.....	439	685	657	28	472.49	3,448.96
Year 1925	4	3	47	47	.....	12	30	30	.....	390	459	459	.....	408.39	3,263.59
Total, switching and terminal roads	.....	8	81	81	.....	38	105	105	.....	1,162	1,583	1,548	35	1,714.20	10,280.46
Yearly totals:															
Year 1923	.....	18,179	40,715	39,336	1,379	3,331	8,438	7,667	771	8,686	18,273	16,600	1,673	3,713.48	23,563.21
Year 1924	.....	18,845	41,743	40,186	1,557	3,849	9,419	8,355	1,064	9,537	20,544	18,646	1,898	4,324.68	20,534.04
Year 1925	.....	19,625	45,003	43,035	1,968	4,029	10,710	9,619	1,091	10,591	22,266	19,932	2,334	3,494.38	22,620.40
Grand total (3 years)	.....	56,649	127,461	122,557	4,904	11,209	28,567	25,641	2,926	28,724	61,083	55,178	5,905	11,532.54	66,717.65

NOTE.—The apparent discrepancies between the number of trips and occupants as shown under the heading, "Home cars on home and foreign railroads" and the column headed "Foreign cars on home railroads" is due (*a*) to differences in methods of keeping records and reporting; (*b*) the fact that the owning road made one report covering trips including several foreign lines (each handling line making a separate report), and (*c*) the trips of private cars of the American Railway Express, Western Union, Pullman Company officials, and small roads which were not included in the order and did not file returns.

APPENDIX B

Statement showing, for 3-year period, the mileage made by private passenger-train cars on lines of carriers listed below

The column "Home cars on home roads" contains the home-line portion of trips made on home and foreign lines. The asterisk (*) indicates roads whose private-car mileage on foreign lines exceeded the mileage on the home line and whose foreign-line mileage was greater than the mileage furnished foreign-line private cars.

Name of railroad	Mileage		
	Home cars on home roads	Home cars on foreign roads	Foreign cars on home roads
Class I roads			
Ann Arbor R. R.*	49,439	57,078	4,284
Akron, Canton & Youngstown*	1,621	13,556	105
Atchison, Topeka & Santa Fe			
Gulf, Colorado & Santa Fe	3,583,454	136,902	548,018
Panhandle & Santa Fe			
Atlanta & West Point			
Western Ry. of Alabama	44,279	7,879	18,465
Atlanta, Birmingham & Atlantic	119,471	3,947	1,051
Atlantic Coast Line	735,231	96,507	456,683
Baltimore & Ohio	1,107,107	160,985	247,825
Bangor & Aroostook	73,595	31,053	1,777
Bessemer & Lake Erie	10,876	4,968	469
Bingham & Garfield	1,607	60	41
Boston & Albany	29,898	4,184	34,024
Boston & Maine	57,323	15,701	105,891
Buffalo & Susquehanna	2,119	1,207	
Buffalo, Rochester & Pittsburgh	82,086	35,150	36,507
Canadian National, mileage in United States only	21,919		1,019
Canadian Pacific	47,067	6,010	1,373
Central of Georgia	343,488	62,013	51,362
Central R. R. of N. J.	57,669	11,835	5,520
Central Vermont	58,110	42,508	58,318
Charleston & Western Carolina*	31,315	45,895	4,214
Chesapeake & Ohio	593,054	111,465	169,305
Chicago & Alton	256,129	90,050	43,716
Chicago & Eastern Illinois	71,095	28,274	44,223
Chicago & North Western	700,031	32,063	81,191
Chicago, Burlington & Quincy	2,321,624	336,847	316,703
Chicago Great Western	102,812	40,744	40,936
Chicago, Indianapolis & Louisville	90,591	9,345	40,356
Chicago, Milwaukee & St. Paul	2,003,595	118,013	158,151
Chicago, Rock Island & Pacific	917,857	184,773	246,249
Chicago, Rock Island & Gulf			
Chicago, St. Paul, Minneapolis & Omaha	30,541	18,986	45,061
Cincinnati, Indianapolis & Western	17,603	17,472	3,804
Cleveland, Cincinnati, Chicago & St. Louis			
Cincinnati Northern			
Evansville, Indianapolis & Terre Haute	459,653	147,196	212,911
Peoria & Eastern			
Clinchfield	38,996	7,197	12,153
Columbus & Greenville			552
Colorado & Wyoming*	318	12,873	
Cumberland & Pennsylvania*	349	43,613	
Delaware & Hudson*	110,209	137,378	32,000
Delaware, Lackawanna & Western	123,606	42,614	15,694
Denver & Rio Grande Western	433,106	91,996	97,901
Denver & Salt Lake*	4,132	8,465	478
Detroit & Mackinac	9,313	266	784
Detroit & Toledo Shore Line			450
Detroit, Toledo & Ironton			2,729
Duluth & Iron Range	11,934	10,208	6,894
Duluth, Missabe & Northern*	22,100	36,759	4,875
Duluth, South Shore & Atlantic	48,816	7,024	3,118
Duluth, Winnipeg & Pacific			14,490
Elgin, Joliet & Eastern	1,898	4,921	
Florida East Coast	83,056	68,456	157,129
Fort Smith & Western	25,998	155	
Georgia & Florida*	46,913	53,640	1,755
Georgia R. R.	55,608	1,002	29,720
Grand Trunk Western	78,728	34,779	82,639

Name of railroad	Mileage		
	Home cars on home roads	Home cars on foreign roads	Foreign cars on home roads
Class I roads—Continued			
Erie R. R.			
Chicago & Erie			
New York, Susquehanna & Western	545,759	119,049	108,801
Wilkes-Barre & Eastern			
Northern Railroad of New Jersey			
Great Northern	1,391,500	154,194	165,151
Green Bay & Western			
Kewaunee, Green Bay & Western	5,220		906
Ahnapee & Western			
Gulf & Ship Island			14,087
Gulf Coast Lines	140,284	14,140	107,610
Gulf, Mobile & Northern	132,689	29,961	5,418
Hocking Valley*	15,587	17,389	10,628
Illinois Central	1,299,374	229,770	314,112
Yazoo & Mississippi Valley			
International Great Northern	110,980	72,475	69,136
Kansas City, Mexico & Orient*	46,985	58,039	4,751
Kansas City Southern	284,557	141,640	19,969
Texarkana & Fort Smith			
Kansas, Oklahoma & Gulf	30,298		567
Lake Superior & Ishpeming*	1,250	1,979	484
Lehigh & Hudson	3,800	640	2,343
Lehigh & New England	8,569	2,472	803
Lehigh Valley	199,405	79,263	18,209
Long Island*	32,376	34,034	5,936
Louisiana & Arkansas	73,510	2,640	4,281
Louisiana Ry. & Navigation Co.	5,174	783	5,081
Louisiana Ry. & Navigation Co. of Texas	29,711	2,333	1,102
Louisville & Nashville	499,376	107,440	147,830
Louisville, Henderson & St. Louis	7,818	196	5,178
Maine Central	21,382	2,028	41,321
Michigan Central	435,184	143,797	180,030
Midland Valley	29,502	171	349
Minneapolis & St. Louis	122,928	14,051	8,004
Minneapolis, St. Paul & Sault Ste. Marie	209,859	92,034	80,009
Mississippi Central	19,818	8,572	184
Missouri & North Arkansas	8,111		
Missouri-Kansas-Texas	497,619	149,186	144,286
Missouri-Kansas-Texas of Texas	1,314,808	233,250	190,709
Missouri Pacific	333,388	73,454	16,106
Mobile & Ohio			4,192
Monongahela			132
Montour			
Nashville, Chattanooga & St. Louis	124,087	48,766	35,021
Nevada Northern*	18,400	42,402	1,806
New Orleans Great Northern*	11,365	51,315	1,092
New York Central	1,315,709	313,253	625,639
Ohio Central Lines			
New York, Chicago & St. Louis	378,198	274,814	29,693
New York, New Haven & Hartford	148,670	72,798	106,85
Central New England			
New York, Ontario & Western	36,841	644	5,822
Norfolk & Western	419,429	192,727	146,703
Norfolk Southern	73,711	44,066	6,310
Northern Pacific	1,472,087	154,232	198,678
Northern Pacific	48,135	24,970	2,384
North Western Pacific	2,048,556	367,264	220,473
Pennsylvania	195,627	30,781	30,554
Pere Marquette			
Pittsburgh & Lake Erie*	20,621	65,312	9,901
Youghiogheny Northern			
Lake Erie & Eastern	2,308	416	160
Pittsburg & Shawmut	1,074	16,873	
Pittsburgh & West Virginia*			414
Pittsburg, Shawmut & Northern	53,647	32,992	12,143
Reading System	18,727	53,271	227,312
Richmond, Fredericksburg & Potomac	9,113	29,073	40,139
Rutland			
St. Louis-San Francisco	1,146,602	172,435	129,508
St. Louis-San Francisco Ry. of Texas			
St. Louis Southwestern	593,783	99,165	22,384
St. Louis Southwestern of Texas			
San Antonio, Uvalde & Gulf	39,021	13,972	7,202
Seaboard Air Line	628,940	139,935	175,611
Southern System	2,243,138	308,019	252,539
Southern Pacific	1,901,832	425,064	771,044
Southern Pacific in Texas	625,790	144,582	270,703

[1] No record.

Name of railroad	Mileage		
	Home cars on home roads	Home cars on foreign roads	Foreign cars on home roads
Class I roads—Continued			
Spokane International			4,544
Spokane, Portland & Seattle	82,242	26,704	69,948
Tennessee Central	32,784	1,678	2,651
Texas & Pacific	310,377	81,678	81,088
Toledo, Peoria & Western	5,800	4,541	4,080
Tampa & Gulf Coast			5,005
Trinity & Brazos Valley	40,049	11,819	6,342
Ulster & Delaware			322
Union Pacific			
Oregon-Washington R. R. & Nav. Co.			
Oregon Short Line	3,022,909	281,904	469,155
Los Angeles & Salt Lake			
St. Joseph & Grand Island			
Virginian	71,830	44,523	4,206
Wabash	394,042	128,896	92,958
Western Maryland	21,050	8,154	2,258
Western Pacific	121,399	20,150	46,978
Wheeling & Lake Erie	98,316	58,031	1,417
Class II roads			
Apache Railway			1,008
Ashley, Drew & Northern			41
Arkansas & Louisiana Missouri	711	891	161
Birmingham & Northwestern			797
Birmingham & Southeastern			30
Blue Ridge Railway			83
Brimstone Railway & Canal			13
Butler County Ry.			133
Cambria & Indiana			428
Chesapeake Beach	687		13
Chestnut Ridge			4
Christie & Eastern			22
Cisco & Northeastern			112
Clinton & Oklahoma Western			302
Charlotte Harbor & Northern			3,491
Columbia, Newberry & Laurens			525
Copper Range*	998	2,428	84
Cornwall R. R.			22
Dayton & Goose Creek			46
De Queen & Eastern			136
Durham & Southern			2,131
East Broad Top R. R. & Canal Co.	1,054		
Escanaba & Lake Superior	310		508
Fonda, Johnstown & Gloversville	1,389		52
Georgia, Florida & Alabama	434	1,148	1,953
Georgia, Southwestern & Gulf			288
Gulf & Sabine River			24
Huntingdon & Broad Top*	3,310	7,024	
Illinois Terminal Co.			33
Interstate R. R.*	4,200	21,544	74
Jefferson Southwestern			22
Lake Erie, Franklin & Clarion	856		
Ligonier Valley			84
Live Oak, Perry & Gulf			44
Longview, Portland & Northern*	10	6,812	60
Louisiana & Pacific*	157	34,214	
Louisiana & Northwest	992	887	99
Louisville & Wadley			40
Midland Terminal*	113	19,027	
Macon, Dublin & Savannah	1,488	940	7,116
Manistee & Northeastern			1,049
Magma Arizona			282
Mineral Range	776		
Minneapolis & Rainy River			76
Minarets & Western			106
Minneapolis, Northfield & Southern*	160	15,058	
Minneapolis, Red Lake & Manitoba			48
Missouri Southern			324
Mississippi Southern			104
Minnesota & International	19,430	6,676	7,615
Mississippi River & Bonne Terre			119
Missouri Illinois			140
Nevada, California, Oregon	4,420		
Newport & Richford	3,457	9,312	366
New Jersey & Indiana			408
Oklahoma City-Ada-Atoka	5,618	2,236	504
Pacific & Idaho Northern	5,160		

Name of railroad	Mileage: Home cars on home roads	Home cars on foreign roads	Foreign cars on home roads
Class II roads (Continued)			
Piedmont & Northern*	2,000	73,000	
Pittsburgh, Lisbon & Western			0
Savannah, Americus & Pacific Ry.*	2,000	37,733	38
Raleigh & Charleston			18
Marion River			24
Red River & Gulf			15
Rio Grande & Eagle Pass			0
Romeo, Sinclair & Pacific			0
San Diego & Arizona*	3,726	25,000	7,0
Savannah & Atlanta			36
Sewell Valley			20
Sierra Ry. Co. of California			50
South Georgia Ry.			33
Sugarland Ry.*	20.0	41,236	
Tampa & Gulf			1,0
Tallulah Falls			13
Tennessee, N. M.	11.2		
Texas Midland*	1,0	23,139	
Texas Mexican*	11,104	20,71	1,0
Texas Southeastern			0
Tonopah & Goldfield	2,249	1,0	0
Tonopah & Tidewater	4,0		1,0
Trailway & Goldfield			0
Tuckerton			0
Tucson, Cornelia & Gila Bend*	0	1,0	0
Virginia & Truckee Ry.			2
Washington, Idaho & Montana			0
Weatherford, Mineral Wells & Northwestern			2
Western Allegheny			0
Wichita Falls & Southern R. R.	0,0	1,0	0
Winston-Salem Southbound			0
Wrightsville & Tennille			0
Yosemite Valley			2,0
Switching and terminal roads			
Alton & Southern	0		
Belt Ry. of Chicago			0
Chicago & Western Indiana			1
Chicago Junction*	0	0	0
Indiana Harbor Belt			3,0
Indianapolis Union			0
Peoria Railway Terminal Co.			0
Portland Terminal Ry.			0
Terminal Ry. Assn. of St. Louis*		0,0	
Texas Pacific-Missouri Pacific Terminal Railroad of New Orleans			0,0
Toledo Terminal R. R.			0
Troy Union Railroad			0
Union Ry. (Tenn.)			2
Union R. R. (Penn.)	0		

APPENDIX C

Movement of private cars occupied by directors of Pennsylvania Railroad

Date	Destination	Mileage	
		Home line	Foreign lines
First director			
Jan 6, 1923	Palm Beach, Fla	270	2,281
June 29, 1923	Mount Desert Ferry, Me	182	1,056
Sept 21, 1923	do	182	1,056
Jan 16, 1924	Palm Beach, Fla	269	2,135
Feb 22, 1924	do	270	2,110
June 30, 1924	Mount Desert Ferry, Me	182	1,056
July 23, 1924	do	182	1,056
Jan 11, 1925	Palm Beach, Fla	270	2,149
Feb 11, 1925	do	269	2,149
Mar 26, 1925	Deadhead one way	270	2,149
June 30, 1925	Mount Desert Ferry, Me, deadhead return	182	1,056
Second director			
Aug 30, 1923	Bristol, Mass	871	491
Oct 12, 1923	Hot Springs, Va	730	570
Jan 11, 1924	Norfolk, Va	1,022	375
Jan 21, 1924	do	270	375
Feb 13, 1924	Miami, Fla	270	2,239
Mar 26, 1924	do	270	2,239
Nov 23, 1924	Norfolk, Va, deadhead one way	270	443
Dec 30, 1924	Lake Placid, N Y	524	666
Jan 29, 1925	Miami, Fla	624	2,115
Jan 24, 1925	Elizabeth City, N C	1,434	982
Apr 1, 1925	Miami, Fla	852	2,281
Nov 28, 1925	Elizabeth City, N C	1,099	839
Third director			
Feb 1, 1923	Fayetteville, N C	270	655
Feb 20, 1923	Pittsburgh, Pa	218	702
Mar 16, 1923	Fayetteville, N C	270	655
Mar 21, 1923	Pittsburgh, Pa	270	694
Feb 15, 1924	do	270	698
Mar 18, 1924	do	270	702
Jan 29, 1925	Fayetteville, N C	430	655
Feb 23, 1925	Pittsburgh, Pa	269	705
Mar 13, 1925	do	270	728
Apr 9, 1925	Fayetteville, N C	270	655
Dec 5, 1925	do	270	655
Fourth director			
Feb 3, 1923	South Bass Grande, Fla	270	2,202
Mar 22, 1923	do	269	2,084
Sept 6, 1923	Saguenay, N Y	212	200
Sept 18, 1923	do	212	200
Jan 17, 1924	South Bass Grande, Fla	269	2,116
Mar 21, 1924	do	270	2,317
Sept 6, 1924	Saguenay, N Y	197	200
Sept 23, 1924	Saguenay, N Y, deadhead going	197	412
Fifth director			
Aug 3, 1923	Boston, Mass	182	694
Aug 21, 1923	do	182	694
Aug 4, 1924	Boston, Mass, deadhead return	182	694
Aug 16, 1924	Boston, Mass, deadhead going	182	694
Aug 4, 1925	Boston, Mass, deadhead return	182	694
Aug 15, 1925	Boston, Mass, deadhead going	182	694
Sixth director			
Feb 8, 1923	South Bass Grande, Fla	270	2,114
Mar 26, 1923	do	270	2,080
Apr 23, 1924	Brunswick, Ga	270	1,402
Aug 17, 1924	Montreal, Canada, deadhead return	182	1,003
Sept 6, 1924	Montreal, Canada, deadhead going	182	1,003
Seventh director			
Nov 22, 1924	Charleston, S C	269	1,025
Jan 5, 1925	do	430	1,025
Jan 30, 1925	Palm Beach, Fla, deadhead one way	270	2,819
Feb 25, 1925	do	270	2,819
Nov 17, 1925	Charleston, S C	269	1,025
Eighth director			
Feb 14, 1923	Miami, Fla	363	2,759
Mar 5, 1923	Ormond, Fla	270	1,784
Aug 23, 1923	Buffalo, N Y	807	485

APPENDIX D

Movement of private cars occupied by a vice president of one carrier and executive of others

Car	Reported leaving	Date	For	Returned to	Date	Mileage on reporting road	Mileage on foreign lines
D. & H. report:							
D. & H. 400	Albany, N. Y.	Jan. 21, 1923	Chicago, Ill., and San Francisco, Calif.	Albany, N. Y.	Mar. 2, 1923	15	7,127
Do	do	Apr. 30, 1923	New York, N. Y.	do	May 3, 1923		262
Do	do	May 13, 1923	Lyon Mountain and New York, N. Y.	do	May 8, 1923	407	574
Do	do	May 16, 1923	Washington, D. C.	do	May 24, 1923	5	2,655
Do	do	June 17, 1923	Chicago, Ill.	do	June 23, 1923	5	2,125
Do	do	June 25, 1923	Lyon Mountain and New York, N. Y.	do	June 26, 1923	810	284
Do	Plattsburg, N. Y.	July 8, 1923	San Francisco, Calif.	do	July 27, 1923	162	7,187
Do	Albany, N. Y.	July 28, 1923	Lyon Mountain and Plattsburg, N. Y.	do	Aug. 3, 1923	732	455
Do	Lyon Mountain, N. Y.	Aug. 15, 1923	New York, N. Y.	do	Aug. 22, 1923	402	200
Do	do	Aug. 30, 1923	do	do	do	202	284
D. & H. 199	Albany, N. Y.	Aug. 25, 1923	Plattsburg and New York, N. Y.	do	Aug. 27, 1923	162	200
D. & H. 500	do	Sept. 13, 1923	Lyon Mountain and New York, N. Y.	do	Sept. 18, 1923	402	284
D. & H. 400	do	Sept. 27, 1923	San Francisco, Calif.	do	Oct. 12, 1923	204	6,722
D. & H. 500	Lyon Mountain, N. Y.	Nov. 5, 1923	New York, N. Y.	do	Nov. 8, 1923	407	443
D. & H. 400	Albany, N. Y.	Nov. 28, 1923	Lyon Mountain and New York, N. Y.	do	Dec. 5, 1923	443	200
Do	do	Dec. 23, 1923	New York, N. Y.	do	Dec. 26, 1923	204	284
Do	Lyon Mountain, N. Y.	Jan. 1, 1924	do	do	Jan. 3, 1924	6	284
D. & H. 500	do	Jan. 26, 1924	do	do	Jan. 29, 1924	407	200
Do	Albany, N. Y.	Feb. 14, 1924	do	Troy, N. Y.	Feb. 14, 1924	306	856
D. & H. 400	do	Mar. 14, 1924	Lyon Mountain and New York, N. Y.	Albany, N. Y.	Mar. 26, 1924	402	114
Do	do	Apr. 10, 1924	Chicago, Ill., Lyon Mountain, and New York, N. Y.	do	Apr. 30, 1924	402	3,150
Do	do	May 7, 1924	New Orleans, La.	do	May 30, 1924		5,529
Do	do	May 30, 1924	Lyon Mountain, N. Y., and Toledo, Ohio	do	June 11, 1924	402	1,409
Do	do	June 18, 1924	New York, N. Y.	do	June 20, 1924	416	573
Do	do	June 30, 1924	Lyon Mountain and New York, N. Y.	do	July 3, 1924	413	284
Do	do	July 14, 1924	do	do	July 31, 1924	1,566	3,258
D. & H. 199	do	July 15, 1924	Louisville, Ky.	do	July 22, 1924	206	1,192
D. & H. 400	do	Aug. 23, 1924	Lyon Mountain and New York, N. Y.	do	Aug. 26, 1924	402	148
Do	do	Aug. 28, 1924	North Bay, Ontario	do	Sept. 4, 1924	545	718
Do	do	Sept. 8, 1924	Lyon Mountain, New York, and Plattsburg, N. Y.	do	Sept. 15, 1924	1,211	870
Do	do	Sept. 27, 1924	New York, N. Y.	do	Oct. 8, 1924	402	432
Do	do	Oct. 11, 1924	Lyon Mountain and New York, N. Y.	do	Oct. 20, 1924	941	3,958
Do	do	Oct. 30, 1924	New York and Lyon Mountain, N. Y.	do	Nov. 13, 1924	402	200

Wabash report:								
Wab. 400	New York, N. Y.	Nov. 15, 1924	Albany and Lyon Mountain, N. Y.	New York, N. Y.	Nov. 17, 1924			692
Do.	do	Nov. 21, 1924	Albany, N. Y.	do	Nov. 24, 1924			692
Do.	do	Nov. 29, 1924	do	do	Dec. 1, 1924			692
Do.	do	Dec. 5, 1924	do	do	Dec. 7, 1924			771
Do.	do	Dec. 12, 1924	do	do	Dec. 16, 1924			771
Do.	do	Dec. 31, 1924	do	do	Jan. 6, 1925			692
Do.	do	Jan. 23, 1925	do	do	Jan. 27, 1925			692
Do.	do	Feb. 6, 1925	do	do	Feb. 10, 1925			692
Do.	do	Feb. 11, 1925	San Francisco, Calif.	do	Mar. 10, 1925	664	9,333	
Do.	do	Mar. 13, 1925	Albany and Lyon Mountain, N. Y.	do	Mar. 17, 1925			771
Do.	do	Mar. 20, 1925	do	do	Mar. 24, 1925			771
Do.	do	Mar. 27, 1925	do	do	Mar. 30, 1925			692
Do.	do	Apr. 13, 1925	Washington, D. C.	do	Apr. 15, 1925			480
Do.	do	Apr. 16, 1925	Albany and Lyon Mountain, N. Y.	do	Apr. 21, 1925			692
Do.	do	Apr. 21, 1925	do	do	Apr. 27, 1925			692
Do.	do	Apr. 30, 1925	do	do	May 6, 1925			692
D. & H. report:								
D. & H. 500	Albany, N. Y.	May 14, 1925	Lyon Mountain, N. Y.	do	May 19, 1925	402	430	
Wabash report:								
Wab. 400	New York, N. Y.	May 29, 1925	Albany and Lyon Mountain, N. Y.	do	June 2, 1925			692
Do.	do	June 4, 1925	Washington, D. C.	do	June 5, 1925			480
Do.	do	June 5, 1925	Albany and Lyon Mountain, N. Y.	do	June 9, 1925			692
Do.	do	June 11, 1925	do	do	June 16, 1925			692
Do.	do	June 18, 1925	do	do	June 23, 1925			692
Do.	do	June 24, 1925	do	do	June 29, 1925			692
Do.	do	July 1, 1925	do	do	July 6, 1925			692
Do.	do	July 24, 1925	Albany and Plattsburg, N. Y.	do	July 28, 1925			674
Do.	do	July 29, 1925	Albany and Lyon Mountain, N. Y.	do	Aug. 1, 1925			692
Do.	do	Aug. 6, 1925	do	do	Aug. 11, 1925			692
Do.	do	Aug. 12, 1925	do	do	Aug. 13, 1925			692
Do.	do	Sept. 2, 1925	do	do	Sept. 8, 1925			692
Do.	do	Sept. 10, 1925	San Francisco, Calif.	do	Oct. 5, 1925			7,193
D. & H. report:								
D. & H. 500	Albany, N. Y.	Sept. 17, 1925	New York and Lyon Mountain, N. Y.	Washington, D. C., and Albany, N. Y.	Sept. 27, 1925	800	1,319	
Wabash report:								
Wab. 400	New York, N. Y.	Oct. 8, 1925	Albany and Lyon Mountain, N. Y.	New York, N. Y.	Oct. 13, 1925			692
Do.	do	Oct. 13, 1925	Pittsburgh, Pa.	do	Oct. 16, 1925			1,447
Do.	do	Nov. 5, 1925	Albany and Lyon Mountain, N. Y.	do	Nov. 8, 1925			692
Do.	do	Nov. 13, 1925	do	do	Nov. 15, 1925			771
Do.	do	Nov. 20, 1925	Boston, Mass.	do	Nov. 23, 1925			476
D. & H. report:								
D. & H. 500	Albany, N. Y.	Nov. 24, 1925	New York and Lyon Mountain, N. Y.	Albany, N. Y.	Dec. 2, 1925	266	415	
Wabash report:								
Wab. 400	New York, N. Y.	Dec. 11, 1925	Albany and Lyon Mountain, N. Y.	New York, N. Y.	Dec. 15, 1925			771

[1] Lyon Mountain is a resort in the Adirondacks.

[2] This movement also included other destinations.

APPENDIX E

Statement covering private cars of the Nickel Plate

Number of car	Old number or date car was built for Nickel Plate	To whom assigned and periods of assignment	Periods cars on lines (months)	Trips exclusively on home line		Home line portion of trips on home and foreign lines (miles)	Total mileage of home cars on home lines		Foreign line portion of trips on home and foreign lines		Total mileage of home cars on home and foreign lines	
				Miles	Miles per car month		Miles	Miles per car month	Miles	Miles per car month	Miles	Miles per car month
21	T. S. L. & W. 60	General superintendent, Frankfort, Ind., Jan. 1, 1923, to Dec. 31, 1925	36	61,672	1,713	414	62,086	1,725	426	12	62,512	1,736
22	T. S. L. & W. 400	Senior vice president, Toledo, Ohio, Jan. 1, 1923, to Dec. 31, 1925	36	13,942	387	7,837	21,779	605	31,586	877	53,365	1,482
23	L. E. W. 69	General superintendent, Jan. 1, 1923, to Dec. 31, 1925, chief engineer, Jan. 1, 1923, to Sept. 16, 1924, district engineer, Sept. 16, 1924, to June 1, 1925, district engineer, June 1, 1925, to Dec. 31, 1925, Indianapolis, Ind.	36	57,898	1,608	2,816	60,714	1,687	2,717	75	63,431	1,762
24	L. E. W. 100	General manager, Jan. 1, 1923, to Feb. 14, 1923, no assignment, Feb. 14, 1923, to Dec. 31, 1924, vice president and general manager, Dec. 31, 1924, to Feb. 5, 1925, assistant general manager, Feb. 5, 1925, to Dec. 31, 1925, Indianapolis, to Feb. 14, 1923, Cleveland, subsequently	36	42,427	1,179	8,104	50,531	1,404	43,891	1,219	94,422	2,623
25		President, Jan. 1, 1923, to Feb. 5, 1925, vice president and general manager, Feb. 5, 1925, to Dec. 31, 1925, Cleveland, Ohio	36	45,312	1,259	10,218	55,530	1,543	59,597	1,655	115,127	3,198
26		Vice president and general manager Jan. 1, 1923, to Dec. 31, 1924, superintendent motive power, Jan. 1, 1925, to Dec. 31, 1925, general superintendent, Jan. 1, 1925, to Apr. 3, 1925, general superintendent, Apr. 11, 1925, to Dec. 31, 1925, chief engineer, Jan. 1, 1925, to May 18, 1925, chief engineer, June 1, 1925, to Dec. 31, 1925, Cleveland, Ohio	36	80,267	2,229	6,520	86,787	2,411	11,363	317	107,134	2,977
27	Built Feb., 1925	Chairman, Feb. 5, 1925, to Dec. 31, 1925, Cleveland, Ohio	11	3,301	300	36	3,337	303	39,791	3,617	34,129	3,102
28	Built as No. 27, May, 1923, restenciled No. 28, Jan. 13, 1925	Chairman, May 16, 1923, to Feb. 5, 1925, president, Feb. 5, 1925, to Dec. 31, 1925, Cleveland, Ohio	32	23,752	742	317	29,369	887	74,818	2,338	102,971	3,218

[1] Note the heavy foreign-line mileage of cars 27, 28, 27, and 28 (italic) and the comparatively heavy average miles per car month of the two latter cars on foreign lines.

APPENDIX F

Statement showing movement of the Louisiana & Pacific (Long-Bell Lumber Corporation) private cars over the Union Pacific Railroad

Car initial and number	Date	From—	To—	Occupants of car (exclusive of car crew)	Transportation	Total mileage on U. P. R. R.
L. & P. Kymokan 100	Apr. 21, 1923	Kelso, Wash	Portland, Oreg	Vice president, S. A. & S. W	Pass	48
				Secretary to vice president	Ticket	
				Assistant to vice president	do	
Do	May 23, 1923	Portland, Oreg	Kelso, Wash	Vice president, S. A. & S. W	Pass	48
				Secretary to vice president	Ticket	
				Assistant to vice president	do	
				Superintendent, Long Bell Lbr. Mills	do	
Do	June 19, 1923	Omaha, Nebr	Portland, Oreg., and Kansas City, Mo	Vice president, S. A. & S. W	Passes	3,790
				Two children of vice president	do	
				Four relatives of vice president	Tickets	
				Secretary to vice president	Ticket	
Do	July 11, 1923	Portland, Oreg	Kansas City, Mo	Vice president, S. A. & S. W	Pass	2,110
				Manager of Longview Farm and wife	Tickets	
				Grandson of president	Ticket	
				Two maids	Tickets	
				Assistant to vice president and wife	do	
L. & P. 101	Sept. 11, 1924	Longview Junction, Wash	Portland, Oreg	Vice president, S. A. & S. W	Pass	45
				Employee	do	
Do	Nov. 15, 1924	Denver, Colo	Ogden, Utah	Vice president, S. A. & S. W	Pass	589
				Two employees	Passes	
L. P. & N. 101	Feb. 1, 1924	Omaha, Nebr	Portland, Oreg	Vice president, S. A. & S. W	Pass	1,775
				Chairman, S. A. & S. W., and wife	Passes	
				Valet to chairman	Pass	
				Assistant to vice president	Ticket	
				Chief clerk, Long Bell Lbr. Co	do	
Do	May 7, 1924	Longview Junction, Wash	Portland, Oreg	Vice president, S. A. & S. W	Pass	45
				General manager, Long Bell Lbr. Co	Ticket	
				Superintendent, Long Bell Lbr. Co	do	
				Manager of stores, Long Bell Lbr. Co	do	
Do	May 19, 1924	Ogden, Utah	Omaha, Nebr	Vice president, S. A. & S. W	Pass	990
				Four employees	Passes	
Do	June 7, 1924	Omaha, Nebr	Portland, Oreg	Vice president, S. A. & S. W	do	1,773
				Two children of vice president	do	
				Friend of vice president's son	Ticket	
				Father of vice president	do	
				Secretary to vice president	do	
				Assistant to vice president	do	
				Family of cook on car	Passes	

Statement showing movement of the Louisiana & Pacific Long Bell Lumber Corporation's private cars over the Union Pacific Railroad—Contd

Car initial and number	Date	From	To	Occupants of car (exclusive of car crew)	Transportation	Total mileage on U. P. R. R.
L. P. & N. 101	Jan. [illegible], 1925	Portland, Oreg.	Omaha, Nebr.	Vice president, S. A. & S. W. Wife and two children of vice president	Pass. Passes	1,782
Do.	Jan. 15, 1925	Kansas City, Mo.	Portland, Oreg.	Vice president and general manager, S. A. & S. W. Wife of chairman, S. A. & S. W. Daughter of chairman Maid of chairman's wife	Pass. Do. Ticket Pass.	2,013
Do.	Feb. 2, 1925	Longview Junction, Wash.	Portland, Oreg.			67
Do.	Apr. 9, 1925	Portland, Oreg.	Omaha, Nebr.	Chairman, S. A. & S. W. President, S. A. & S. W., and wife Treasurer, Long Bell Lbr. Co. Sister of president's wife Valet to chairman Vice president and general manager Vice president, S. A. & S. W.	Pass. Passes Ticket Do. Pass. Do. Do.	1,782
Do.	June 11, 1925	Omaha, Nebr.	Portland, Oreg.	Wife and two children of vice president Assistant to vice president Granddaughter of vice president Secretary to vice president Friend of son of vice president Father of vice president Invalchair	Passes Pass. Ticket Do. Do. Do. Do.	1,772
Do.	June 18, 1925	Portland, Oreg.	Omaha, Nebr.			2,782
Do.	July 17, 1925	Omaha, Nebr.	Ogden, Utah.	Vice president and general manager, S. A. & S. W., and wife Valet to vice president Maid to vice president's wife	Passes Pass Do.	908
Do.	Aug. 28, 1925	Portland, Oreg.	Omaha, Nebr.	Vice president and general manager, S. A. & S. W. Valet to vice president Maid to vice president's wife Two passengers	Passes Pass Do. Tickets	1,782
Do.	Sept. 12, 1925	Kansas City, Mo.	Portland, Oreg., and Omaha, Nebr.	Vice president, S. A. & S. W. Assistant to vice president and wife Treasurer, Long Bell Lbr. Co., and wife Maid	Pass. Passes Tickets Ticket	2,790

APPENDIX G

Statement showing movement of Nevada Northern private cars on Western Pacific, Southern Pacific, and Union Pacific

Car	Date	From—	To—	Occupants	Mileage
On Western Pacific[1]					
No. 100	Jan. 4, 1923	Salt Lake, Utah	Shaffer, Nev.	General manager, N. N.	162
Do.	Feb. 1, 1923	Shaffer, Nev.	Salt Lake, Utah	Deadhead	162
Do.	Feb. 7, 1923	Salt Lake, Utah	Shaffer, Nev.	General manager, N. N.	162
Do.	June 9, 1923	Shaffer, Nev.	Salt Lake, Utah	do	162
Do.	Sept. 26, 1923	do	Oakland, Calif.	General manager, N. N., and wife	762
Do.	July 13, 1923	do	Salt Lake, Utah	General manager, N. N.	324
Do.	June 14, 1923	do	do	General manager, N. N., and wife, wife of M. M. & F. wife of chief surgeon, N. N.	762
Do.	Oct. 19, 1923	do	do	General manager, N. N.	162
Do.	Nov. 6, 1923	Salt Lake, Utah	Shaffer, Nev.	do	162
Do.	Mar. 17, 1924	Shaffer, Nev.	Salt Lake, Utah	General manager, N. N., and wife, traffic manager, N. N., and wife	324
Cyprus	Mar. 27, 1924	Oakland, Calif.	Shaffer, Nev.	Vice president, N. N., and wife	762
Do.	Mar. 31, 1924	Shaffer, Nev.	Salt Lake, Utah	do	162
Do.	Aug. 4, 1924	do	do	do	162
Do.	Aug. 16, 1924	Alston, Nev.	Oakland, Calif.	do	713
No. 101	Jan. 24, 1923	Shaffer, Nev.	Salt Lake, Utah	General manager, N. N.	162
Do.	Mar. 6, 1923	Salt Lake, Utah	Shaffer, Nev.	Vice president, N. N.	162
Do.	May 18, 1923	Shaffer, Nev.	Oakland, Calif.	General manager, N. N., and wife	762
Do.	June 29, 1923	do	Salt Lake, Utah	do	162
Do.	July 2, 1923	Salt Lake, Utah	Shaffer, Nev.	General manager, N. N.	162
Do.	Aug. 11, 1923	Alston, Nev.	Oakland, Calif.	do	713
Do.	Nov. 22, 1923	Shaffer, Nev.	Salt Lake, Utah	do	162
Total miles					7,228
On Southern Pacific[2]					
No. 101	Jan. 2, 1923	Cobre, Nev.	Ogden, Utah	General manager, N. N.	137
Do.	Feb. 20, 1923	do	San Francisco, Calif., Maricopa, Ariz.	Vice president, C. R. & N. W.	1,619
Cyprus	[3]	Oakland Pier, Calif.	Cobre, Nev.	Vice president, N. N.	641
No. 101	Mar. 6, 1923	Maricopa, Ariz.	San Francisco, Calif., Cobre, Nev.	Vice president, C. R. & N. W.	1,620
Cyprus	May 10, 1923	Deming, N. Mex.	Maricopa, Ariz.	Vice president, N. N.	310
Do.	May 13, 1923	Maricopa, Ariz.	Oakland Pier, Calif.	do	897
No. 100	May 25, 1923	Ogden, Utah	Cobre, Nev.	President, C. R. & N. W.	138
Do.	May 27, 1923	Cobre, Nev.	Ogden, Utah	do	137
No. 101	June 15, 1923	Oakland, Calif.	Cobre, Nev.	General manager, N. N.	641
Cyprus	Aug. 15, 1923	Ogden, Utah	Oakland Pier, Calif., Sacramento, Calif., Oakland Pier, Calif.	Vice president, N. N.	1,727
No. 100	Aug. 4, 1923	Portland, Oreg.	Merced, Calif.	President, N. N.	914
Do.	Aug. 9, 1923	Merced, Calif.	Ogden, Utah	do	808
Cyprus	do	Oakland, Calif.	do	Vice president, N. N.	778
No. 100	Oct. 18, 1923	Ogden, Utah	Cobre, Nev.	President, C. R. & N. W.	138
Do.	Oct. 20, 1923	Cobre, Nev.	Ogden, Utah	do	137
Cyprus	Nov. 19, 1923	Deming, N. Mex.	Los Angeles, Calif.	Vice president, N. N. (for repairs)	1,440
Do.	Dec. 2, 1923	do	Maricopa, Ariz.	Vice president, N. N.	310

[1] Car Cyprus is privately owned by a vice president of the Nevada Northern.
[2] Trips made on Western Pacific by Nevada Northern cars 100, 101, and Cyprus during 1923, 1924, and 1925.
[3] Trips made on Southern Pacific by Nevada Northern cars 100, 101, and Cyprus.

Statement showing movement of Nevada Northern private cars on Western Pacific, Southern Pacific, and Union Pacific—Continued

Car	Date	From—	To—	Occupants	Mileage
On Southern Pacific—Con.					
Cyprus	Dec. 5, 1923	Maricopa, Ariz.	San Francisco, Calif.; Oakland, Calif.	Vice president, N. N.	979
No. 101	Jan. 21, 1924	Cobre, Nev.	Oakland Pier, Calif.	General manager, N. N.	1,282
Cyprus	do	Oakland Pier, Calif	Ogden, Utah	Vice president, N. N.	778
Do	Mar. 15, 1924	Ogden, Utah	Oakland Pier, Calif	do	770
Do	May 7, 1924	Deming, N. Mex.	Maricopa, Ariz.	do	310
Do	May 10, 1924	Maricopa, Ariz.	Oakland Pier, Calif.; Sacramento, Calif.	do	995
Do	do	Sacramento, Calif.	Oakland Pier, Calif.	Unoccupied	85
No. 101	June 6, 1924	Cobre, Nev.	do	General manager, N. N.	1,282
Do	July 6, 1924	do	Reno, Nev.	do	401
Cyprus	June 4, 1924	Oakland Pier, Calif.	Cobre, Nev.	Vice president, N. N.	636
Do	Aug. 15, 1924	Ogden, Utah	Alazon, Nev.	do	180
Cyprus	Aug. 22, 1924	Oakland, Calif.	Ogden, Utah	Vice president, N. N.	773
No. 101	Sept. 27, 1924	Cobre, Nev.	Oakland Pier, Calif.	General manager, N. N.	1,277
No. 100 C. R. & N. W.	Nov. 22, 1924	Los Angeles, Calif.	El Paso, Tex.	Treasurer, C. R. & N. W.	853
Do	Dec. 11, 1924	Ogden, Utah	Cobre, Nev.	President, C. R. & N. W.	139
Do	Dec. 12, 1924	Cobre, Nev.	Ogden, Utah	do	138
Do	Dec. 24, 1924	Ogden, Utah	Oakland Pier, Calif.	do	1,521
Cyprus	Dec. 3, 1924	El Paso, Tex.	Ray Junction, Ariz.; Oakland Pier, Calif.	Vice president, N. N.	1,528
No. 100 C. R. & N. W.	Feb. 11, 1925	Tucumcari, N. Mex.	El Centro, Calif.	President, C. R. & N. W.	965
No. 101	Feb. 17, 1925	Los Angeles, Calif.	Nogales, Ariz.	General manager, N. N.	569
Do	Feb. 28, 1925	Nogales, Ariz.	Los Angeles, Calif.	do	569
Cyprus	(?)	Oakland Pier, Calif.	Ogden, Utah	Vice president, N. N.	773
Do	Mar. 23, 1925	do	do	do	773
Do	May 4, 1925	Deming, N. Mex.	Ray Junction, Ariz.	do	491
Do	May 10, 1925	Los Angeles, Calif.	Oakland Pier, Calif.	do	497
No. 101	May 20, 1925	Oakland, Calif.	Cobre, Nev.	General manager, N. N.	636
Cyprus	July 10, 1925	Oakland Pier, Calif.	Deming, N. Mex.; Winkleman, Ariz.; Phoenix, Ariz.; Ray Junction, Ariz.; San Francisco, Calif.; Portland, Oreg.	Vice president, N. N.	3,656
Do	Aug. 22, 1925	Ogden, Utah	Oakland Pier, Calif.	do	779
No. 101	Aug. 19, 1925	Oakland, Calif.	Cobre, Nev.	General manager, N. N.	636
Cyprus	Aug. 15, 1925	Cobre, Nev.	Wells, Nev.	Vice president, N. N.	47
Do	(?)	Oakland Pier, Calif.	Ogden, Utah	do	773
Do	Nov. 5, 1925	Phoenix, Ariz.	Ray Junction, Ariz.	do	499
Do	Nov. 8, 1925	Deming, N. Mex.	Tucumcari, N. Mex.	do	420
Do	Dec. 1, 1925	Ogden, Utah	Oakland Pier, Calif.; San Jose, Calif.; Oakland Pier, Calif.	do	965
					[1] 35,700

[1] Total mileage, not including 3,616 miles by C. R. & N. W. car No. 101.

Trips made on Union Pacific by Nevada Northern private cars

Car	Movement	Occupants
N. N. 100	Ogden, Utah, to Los Angeles, Calif., Aug. 13, 1923, mileage 1,708.	President, N. N., and wife, passes; president's daughter, pass; secretary to president, pass; two guests, tickets; two maids, tickets; valet, ticket.
Do	Council Bluffs, Iowa, to Salt Lake City, Utah, May 21, 1923, mileage 1,065.	President, C. R. & N. W., pass; vice president and general manager, C. R. & N. W., pass; another vice president, C. R. & N. W. pass; secretary to president, pass.
Do	Ogden, Utah, to Council Bluffs, Iowa, May 28, 1923, 993 miles.	President, C. R. & N. W., pass; vice president, C. R. & N. W., pass; secretary to president, pass
Do	Butte, Mont., to Salt Lake City, Utah, Oct. 16, 1923, mileage 469.	President, C. R. & N. W., pass; two employees of N. N., passes.
Do	Ogden, Utah, to Omaha, Nebr., Oct. 21, 1923, mileage 990.	President, C. R. & N. W., pass; vice president and general manager, C. R. & N. W., pass; secretary to president, pass.
N. N. Ely 101	Ogden, Utah, to Omaha, Nebr., Jan. 3, 1923, mileage 990.	General manager, N. N., and wife, passes; daughter of general manager, pass; nurse, pass.
Do	Omaha, Nebr., to Salt Lake City, Utah, Jan. 9, 1923, mileage 1,026.	General manager, N. N., and crew (cook and porter), passes.
Do	Salt Lake City, Utah, to Council Bluffs, Iowa, Feb. 2, 1923, mileage 2,058.	General manager, N. N., and wife, daughter, and crew, passes.
Do	Salt Lake City, Utah, to Los Angeles, Calif., Oct. 19, 1923, mileage 784.	General manager, N. N., and wife, passes; chief surgeon, N. N., and wife, passes; storekeeper, pass.
Do	Los Angeles, Calif., to Salt Lake City, Utah, Nov. 4, 1923, mileage 784.	
N. N. Cyprus	Salt Lake City, Utah, to Ogden, Nev., Mar. 24, 1923, mileage 433.	Vice president, N. N., and wife, passes; maid, pass; secretary to vice president, pass.
Do	Salt Lake City to Ogden, Utah, Aug. 13, 1923, mileage 36.	Vice president, N. N., pass; secretary to vice president, pass.
Do	Ogden, Utah, to Butte, Mont., via Salt Lake City, Utah, Oct. 2, 1923, mileage 469.	Vice president, N. N., and wife, passes; maid, pass; secretary, pass; vice president and general manager, B. & G., pass; assistant general manager, Utah Copper Co., ticket.
Do	Salt Lake City to Ogden, Utah, Aug. 6, 1924, mileage 1,044.	President, B. & G., pass; secretary, pass; vice president, B. & G., pass; doctor, ticket; passenger, ticket.
Do	Ogden, Utah, to Omaha, Nebr., Oct. 9, 1924, mileage 1,062.	President, B. & G., and wife, passes; secretary and maid, passes.
Do	Omaha, Nebr., to Ogden, Utah, Mar. 14, 1924, mileage 990.	President, B. & G., and secretary, passes.
Do	Ogden, Utah, to Omaha, Nebr., Mar. 2, 1925, mileage 990.	President, B. & G., and secretary, passes.
Do	Butte, Mont., to Salt Lake City, Utah, Mar. 17, 1925, mileage 433.	Do.
Do	Ogden, Utah, to Omaha, Nebr., Apr. 2, 1925, mileage 990.	President, B. & G., wife, maid, and secretary, passes.
Do	Butte, Mont., to Salt Lake City, Utah, Aug. 11, 1925, mileage 433.	President, B. & G., and secretary, passes.
Do	Salt Lake City to Ogden, Utah, Aug. 18, 1925, mileage 578.	President, B. & G., and secretary, passes.
Do	Ogden, Utah, to Omaha, Nebr., Sept. 30, 1925, mileage 1,062.	President, B. & G., wife, secretary, and maid, passes; guest, ticket.
Do	Omaha, Nebr., to Ogden, Utah, Nov. 30, 1925, mileage 990.	President, B. & G., and secretary, passes.
N. N. 100	Council Bluffs, Iowa, to Salt Lake City, Utah, Aug. 7, 1925, mileage 2,946. Trude, Idaho; Pocatello, Idaho.	President, N. N., pass; five passengers, tickets; valet, ticket; secretary, ticket.
N. N. 101	Salt Lake City, Utah, to Los Angeles, Calif., Feb. 14, 1925, mileage 784.	General manager, N. N., and wife, passes; secretary, pass; chief surgeon, N. N., and wife, passes.
Do	Los Angeles, Calif., to Salt Lake City, Utah, Mar. 4, 1925, mileage 784.	Do.
Do	Salt Lake City, Utah, to Payette, Idaho, and return, June 29, 1925, mileage 940.	General manager, N. N., and wife, passes.

APPENDIX H

Statement showing movement of Pullman cars occupied by railway officials and others and transported free or at less than published tariff rates

ON UNION PACIFIC RAILROAD

Name of car	Movement	Occupants
National	Omaha, Nebr., to Ogden, Utah, Mar. 10, 1923, mileage 990.	Cook and porter.
Do	Ogden, Utah, to Omaha, Nebr., Mar. 13, 1923, mileage 990.	Director of M. P. R. R., pass; two nurses, passes; four passengers, tickets.
Do	Omaha, Nebr., to Ogden, Utah, Aug. 31, 1923, mileage 990.	Waiter, cook, and porter.
Do	Ogden, Utah, to Omaha, Nebr., Sept. 5, 1923, mileage 990.	Director of M. P. R. R., and wife, passes; three passengers, tickets.
Pioneer	Omaha, Nebr., to Ogden, Utah, Jan. 20, 1923, mileage 990.	Director of S. P. Co., pass; valet to director, pass; relative of director, her secretary, maid, and man servant, tickets.
Do	Ogden, Utah, to Omaha, Nebr., Jan. 23, 1923, mileage 990.	Director of S. P. Co., pass; valet, pass; relative of director, her secretary, maid, man servant, and laundress, tickets.
Do	Ogden, Utah, to Omaha, Nebr., Mar. 10, 1923, mileage 990.	Director of S. P. Co., pass; director's valet, pass; director's relative, her secretary and servants, tickets.
Boston	Omaha, Nebr., to Ogden, Utah, Mar. 2, 1924, mileage 990.	Director of S. P. Co., pass; director's valet, pass; director's relative, her secretary, and three maids, tickets.
Do	Ogden, Utah, to Omaha, Nebr., Mar. 8, 1924, mileage 990.	Do.
Do	Omaha, Nebr., to Los Angeles, Calif., July 29, 1924, mileage 1,810.	Car crew.
Do	Butte, Mont., to Omaha, Nebr., Aug. 27, 1924, mileage 1,681.	President of T. & W. Ry., wife and daughter, passes; two passengers, tickets.
Chicago	Omaha to Portland, Oreg., Mar. 17, 1924, via Denver, mileage 2,229.	President of T. & W. Ry., and wife, passes; secretary to president, ticket; two passengers, tickets; maid and valet, passes.
Advance	Portland, Oreg., to Omaha, Nebr., July 8, 1925, mileage 1,994.	Assistant to president of N. P., pass; personal physician of assistant to president, and wife, tickets; four Government officials, tickets.
Philadelphia	Omaha, Nebr., to Ogden, Utah, July 17, 1925, mileage 990.	Director of S. P., pass; valet, pass; relative of director, her secretary, and three servants, tickets.
Do	Ogden, Utah, to Omaha, Nebr., Jan. 21, 1925, mileage 990.	Do.
Washington	Omaha, Nebr., to Seattle, Wash., Apr. 7, 1925, mileage 1,970.	Director U. P. R. R., pass; three passengers, tickets.

ON NEW YORK CENTRAL RAILROAD

Pullman car	Date	Occupants
Pioneer	Jan. 17, 1923	Director, N. Y. C., and party.
Do	Mar. 12, 1923	Do.
Boston	Apr. 30, 1923	Wife of president, N. Y. C.
Chicago	June 11, 1923	President, R. L. Trans. Co.
Republic	Aug. 26, 1923	Do.
National	Sept. 7, 1923	Director.
Boston	Oct. 15, 1923	President, Magma Arizona R. R.
Chicago	Oct. 15, 1923	President, R. L. Trans. Co.
Do	Oct. 17, 1923	Do.
Adventurer	Nov. 1, 1923	Director, Mo. Pac.
Do	Nov. 5, 1923	Do.
Newport	Nov. 1, 1923	Director, A., T. & S. F.
Do	Nov. 5, 1923	Do.
Washington	Jan. 15, 1924	Director, N. Y. C., and party.
Boston	Mar. 10, 1924	Do.
Colonial	Apr. 17, 1924	Vice president and treasurer, C. R. & N. W., and party.
Newport	Apr. 22, 1924	President, Magma Arizona R. R.
Constitution	Apr. 27, 1924	Director, L. A. & S. L.
Do	Apr. 30, 1924	Do.
Superb	June 14, 1924	Director, Vgn. Ry., and party.
Pioneer	July 2, 1924	Chairman, Union Stock & Transit Co., and party.
Do	Aug. 28, 1924	Do.
Adventurer	Oct. 13, 1924	President, R. L. Trans. Co., and party.
Do	Oct. 17, 1924	Do.

Statement showing movement of Pullman cars occupied by railway officials and others and transported free or at less than published tariff rates—Continued

ON NEW YORK CENTRAL RAILROAD—continued

Pullman car	Date	Occupants
Superb	Oct. 23, 1924	Director, Mo. Pac.
Do	Oct. 26, 1924	Do.
Colonial	Oct. 7, 1924	Director, Virginian.
Do	Oct. 8, 1924	Do.
Philadelphia	Jan. 15, 1925	Director, N. Y. C., and party.
Ideal	Jan. 9, 1925	Vice President, Mo. Pac., and wife.
Do	Jan. 10, 1925	Do.
Chicago	June 12, 1925	Director, L. A. & S. L., and party.
Patriot	Oct. 22, 1925	Director, Mo. Pac., and party.
Clysma	Oct. 20, 1925	Do.
National	Oct. 19, 1925	President, R. I. Trans. Co., and party.
Do	Oct. 21, 1925	Do.
New York	Nov. 20, 1925	President, Toledo & Western, and party.
Do	Nov. 22, 1925	Do.
Ideal	Nov. 30, 1925	President, R. I. Trans. Co.
Other than those listed were		
Boston		Director, N. P. and president, W. F. Exp.
Philadelphia		President, Chicago, North Shore & Milwaukee.
Pioneer		Director, Virginian.
Palm Beach		Do.
Colonial		Passenger traffic manager, Nor. Pac.
Commonwealth		Chairman of board, Reading.
Washington		President, Tremont & Gulf.
Do		Director, U. P. R. R.
Chicago		Vice president, N. O. G. N.
Patriot		General counsel, W. Va. No.
Columbia		President, Waycross & Georgia.
Mayflower		Director, Wabash Ry.
Constitution		President, Virginian.
New York		Treasurer, Durham & Southern.

By the commission.

[SEAL.]

GEORGE B. McGINTY,
Secretary.

U. S. GOVERNMENT PRINTING OFFICE: 1929

[fols. 72 & 73] Bond on appeal for $500.00, approved and filed October 15, 1930, omitted in printing.

[fol. 74] In United States District Court

[Title omitted]

Order Permitting Withdrawal of Narrative Statement—Filed Oct. 15, 1930

Upon application of the above named petitioners and the presentation of telegraphic agreement thereto by counsel for the defendants herein, it is by the court ordered that there may be withdrawn from the files and that there be withdrawn from the files herein the narrative statement heretofore filed, and that there be substituted therefor the narrative statement filed herein on this 9th day of October, 1930.

Dated at Kansas City, Missouri.

Kimbrough Stone, United States Circuit Judge.
Albert L. Reeves, Merrill E. Otis, United States District Judges.

[fol. 75] In United States District Court

[Title omitted]

Order Approving Statement of Evidence—Filed Oct. 15, 1930

The undersigned, being the three judges who tried the above-entitled cause, in which a final decree was entered on to-wit, the 19th day of September, 1930, do hereby certify that the substituted narrative statement of the evidence prepared by the petitioners and appellants, consisting of eleven pages, and the published report of the Interstate Commerce Commission in Docket No. 17757, In the Matter of Use of Private Passenger Train Cars, reported in 155 I. C. C. pages 775 to 811, inclusive, which have been filed for record in this cause on this 9th day of October, 1930,

together with the additional portions of the record attached to the præcipe filed by the United States of America and the Interstate Commerce Commission in the record in this cause on the 8th day of October, 1930, constitute an adequate statement of the evidence necessary for a determination of the issues in this cause upon appeal to the Supreme Court of the United States under Rule 75 of the Equity Rules, and also under rule 10 of the rules of the Supreme Court of the United States.

Kimbrough Stone, United States Circuit Judge.
Albert L. Reeves, Merrill E. Otis, United States District Judges.

[fol. 76] In United States District Court

In Equity. No. 1450

The Kansas City Southern Railway Company and Texarkana and Fort Smith Railway Company, Plaintiffs,

vs.

United States of America and Interstate Commerce Commission, Defendants

Before Stone, Circuit Judge, and Reeves and Otis, District Judges

Opinion—Filed Aug. 27, 1930

Per Curiam:

On November 4, 1929, the Interstate Commerce Commission issued its order No. 17757 requiring railroad companies, engaged in interstate commerce, on or before January 15, 1930, to cease and desist and thereafter abstain from the transportation or movement of private passenger train cars, including so-called office cars, of another carrier free or at other than published tariff rates. On July 30, 1929, the Commission issued an order prohibiting the issuance of car passes except for cars belonging to the issuing carrier or held by it under lease for use in its business as common carrier. It was provided in the order of July 30,

1929, that it should become effective August 1, 1929. The effective dates of both orders have been postponed pending the decision of this case.

Petitioners in this action seek to have enjoined the enforcement of the orders of November 4 and July 30, 1929, in so far as they apply to office cars, exclusively used as such, on the grounds: 1. That a railway company, in the transportation or movement of an office car of another carrier, acts in the capacity of a private carrier or bailee, and retains full freedom of contract in reference thereto, and for that reason is not subject to the Commission's orders; 2. That there was no evidence to support a finding [fol. 77] by the Commission that the free movement over a foreign line of the office car of another company occupied by the latter's officers and employees traveling on the business of that company, was unjustly discriminatory or unduly preferential and prejudicial; 3. That the act creating the Interstate Commerce Commission and acts amendatory thereof have been construed by the Commission and Congress as permitting movements of office cars over foreign lines under free passes.

1. The contention most earnestly pressed upon us by the petitioners is that a railroad company may as a private carrier enter into contracts on such terms as it choses for the transportation of whatever it does not publicly offer to carry as a common carrier. If it has no published tariff rates for the movement of office cars then, it is urged, it may contract to move them either free of charge or at some agreed rate and the Act creating the Interstate Commerce Commission gives it no jurisdiction with respect to such private carrier contracts. First of all then we proceed to examine the validity of this contention.

Undoubtedly it is true that a common carrier also may be in some situations a private carrier. Terminal Taxicab Company v. Katz, 241 U. S. 252; Santa Fe Railway v. Grant Bros., 228 U. S. 177; Chenery v. Employer's Liability Assur. Corp., (9 C. C. A.) 4 F (2) 826; Railroad Company v. Lockwood, 17 Wall, 357. It is true that notwithstanding the Interstate Commerce Act such a common carrier as a railroad company may in some situations contract to carry both persons and property as a private carrier. Santa Fe Railway v. Grant Bros., supra; Chenery

v. Employer's Liability Assur. Corp., supra. Thus a railroad company as a private carrier may contract to carry employees of a contractor engaged in doing work on its lines and the servants of an express company carrying express on its lines. And it may contract to carry persons beyond the terminus of its passenger line over a line [fol. 78] used generally only for the carriage of freight. If it holds itself out solely as a common carrier of freight it may enter into a contract as a private carrier to carry an individual as a passenger. "But when a carrier has a regularly established business for carrying all or certain articles, and especially if that carrier be a corporation created for the purpose of the carrying trade, and the carriage of the articles is embraced within the scope of its chartered powers, it is a common carrier, and a special contract about its responsibility does not divest it of the character." Railroad Co. v. Lockwood, supra, l. c. 377.

From a consideration of the cases cited and others dealing with the same subject we conceive that the right of a railroad company to contract to carry as a private carrier is limited to what lies outside the general scope of its business as a common carrier. If it holds itself out as a common carrier of passengers it certainly cannot divest itself of that character by entering into a special private carrier contract with some individual whose sole use of its facilities is travel from one point to another in pursuit of his own business. If it is a common carrier of freight it certainly cannot enter into a special contract with some individual who in his own business desires to ship goods of some particular character. Only when it goes outside of the general scope of its common carrier business can it contract as a private carrier.

It is not necessary to consider what might be the law if railroad companies did not hold themselves out as common carriers of private cars. They do. They have established tariffs for the transportation of such cars. That is a part of their common carrier business. It is within the scope of their chartered powers. As to such transportation therefore they cannot, if they would, divest themselves of the character of common carriers by any private contracts. The suggestion that some distinction may be made between one private car and other because the occu-

[fol. 79] pants of one transact business as they travel and the occupants of the other do not seems to us of little, if any, weight. If a lawyer on his way to argue a case before the Supreme Court in Washington takes along the record and the briefs and devotes every waking minute to the preparation of his argument and so to the transaction of his legal business is he therefore in some different catagory from another who goes only to see the sights? And if by some miracle that lawyer should own or be loaned a private car, have it fitted up with a law library, carry a stenographer along, agree that he will engage in his own business only as he travels, may a railroad then contract as a private carrier to transport his car free of charge while another must pay the established rates for the movement of his private car? What is done within the car by the occupants thereof certainly does not change the character of the service rendered.

It has been held indeed that a railroad may enter into a private carrier contract for the movement of a circus train. Chicago, M. & St. P. R. Co. v. Wallace, (7 C. C. A.) 66 Fed. 506. It has been so held because of the clear distinction between such an extraordinary, unusual service and the general business of a railroad as a common carrier. As was said in the cited case: "We know from common observation that (railroads) do not hold themselves out as common carriers of wild and domestic animals to be transported in the private cars of the owners, and loaded in a manner agreeable to the owners; persons, animals, horses, and other property being carried upon the same train, which is operated at irregualr times and seasons, at the convenience of the owners of such cars." Here is a marked distinction between extraordinary and usual railroad business. But the distinction arises from the great difference in the nature of the service required of the railroad. Certainly there is no such distinction between the movement of one private car carrying officials and employes of another railroad and of another private car carrying persons not connected with another railroad.

[fol. 80] Our view then is and we hold that the transportation of private cars, whether called and used as office cars or not, is within the general scope of the common carrier business of railroads and therefore not within that limited field within which they can contract as private carriers.

If we are right in this conclusion then it is unnecessary to consider the subordinate proposition that the Inter-state Commerce Commission has no jurisdiction to regulate the private carrier business of railroads.

2. Assuming that the movement of private cars, whether so called office cars or others, is within the general scope of the common carrier business of railroads and therefore subject to governmental regulation, we consider the second contention made by the petitioners, to wit: that "there was no evidence to support a finding by the Commission that the free movement over a foreign line of the office car of another company occupied by the latter's officers and employees traveling on business of that company, was unjustly discriminatory or unduly preferential and prejudicial." We dispose of the contention by saying that the always admitted fact that such private car movements have been free is alone sufficient evidence of discrimination. That there was also abundant evidence that this primary discrimination resulted in other concededly indefensible discriminations in the transportation of persons other than those engaged in the business of the railroad owning an office car may be disregarded, except that it may be said that the secondary evils alone perhaps are sufficient to justify the eradication of the root of those evils. It is not for us to inquire into the wisdom of the Commission's action, if it had the power to act.

3. The final contention of the petitioners that the Inter-state Commerce Commission Act and its amendments authorize the free movement of office cars belonging to other railroads remains. It is not urged that they do this expressly, and certainly they do not, but that they have been construed both by the Commission and the Congress [fol. 81] as so doing and that that construction has so entered into and become a part of them that only Congressional action can effect a change. The rule or statutory construction relied on is that referred to in Luckenbach S. S. Co. v. United States, 280 U. S. 173, and United States v. Jackson, 280, U. S. 183, and in a multitude of cases. "It is a settled doctrine * * * that, in cases of ambiguity, the judicial department will lean in favor of a construction

given to a statute by the department charged with the execution of such statute."

But before this rule is of value to him asserting it he must show two things: first, that the statute he relies on is ambiguous and, second, that the executive department charged with administering it has, not once or occasionally, but continuously and consistently given a certain construction to it.

Now the provisions of the Interstate Commerce Act to which petitioners especially point is that part of Section 22 of the original Act of 1887 (24 Stat. at Large 379) which reads: "Nothing in this act shall be construed * * * to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employees." The argument is that this language conceivably may include both individual passes for officers and employees and also passes for office cars carrying officers and employees having individual passes. If that is a possible construction the language may be said to be ambiguous. It seems to us to be an impossible construction. It is perfectly clear that only the free transportation of individuals was contemplated by the language used.

If, as we think, the contended for construction is wholly unreasonable then what orders may have been made by the Commission is unimportant. In any event the only order to which petitioners point as evidence of that continuous and consistent interpretation called for by the rule of statutory constructions relied on is a single conference ruling under date of June 30, 1908, dealing with the form of passes and apparently recognizing passes for office cars. [fol. 82] That is altogether insufficient to show a continuous and consistent interpretation.

Our conclusion on the whole case is that the petitioner's bill should be dismissed.

An appropriate decree may be prepared and submitted for approval and entry.

[fol. 83] Clerk's certificate to foregoing transcript omitted in printing.

[fols. 84 & 85] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION TO PRINT ENTIRE RECORD—Filed Oct. 17, 1930

Come now the appellants and adopt their assignments of error as their statement of the points to be relied upon, and represent that the whole of the record as filed is necessary for the consideration of the case.

Samuel W. Moore, Frank H. Moore, A. F. Smith, Cyrus Crane, Solicitors for Appellants.

Service of the foregoing statement of points to be relied upon and designation by appellants of the parts of the record to be printed, and receipt of a copy thereof, are hereby admitted and acknowledged.

United States of America, by Elmer B. Collins, Special Asst. to the Attorney General, October 17, 1930. Interstate Commerce Commission, by Daniel W. Knowlton, Its Solicitor, Interstate Commerce Bldg., Washington, D. C.

[fol. 86] [File endorsement omitted.]

Endorsed on cover: File No. 35,439. W. Missouri, D. C. U. S. Term No. 517. The Kansas City Southern Railway Company and Texarkana and Fort Smith Railway Company, appellants, vs. The United States of America and Interstate Commerce Commission. Filed October 18, 1930. File No. 35,439.

FILE COPY

Office Supreme Court, U. S.
FILED
OCT 24 1930
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 517.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY and TEXARKANA AND FORT SMITH RAILWAY COMPANY,

Appellants,

v.

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Appellees.

APPEAL FROM UNITED STATES DISTRICT COURT FOR THE WESTERN DIVISION OF THE WESTERN DISTRICT OF MISSOURI.

MOTION BY APPELLANTS TO ADVANCE.

FRANK H. MOORE,
CYRUS CRANE,
Solicitors for Appellants.

SAMUEL W. MOORE,
Of Counsel.

October 24, 1930.

Pandick Press, Inc., 22 Thames St., New York, U. S. A.

IN THE

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Appellees.

APPEAL FROM UNITED STATES DISTRICT COURT FOR THE WESTERN DIVISION OF THE WESTERN DISTRICT OF MISSOURI.

MOTION BY APPELLANTS TO ADVANCE.

Come now the appellants in the above-entitled cause and move that the said cause be advanced for an early hearing, and in support of their motion, make the following brief statement of the matter involved and the reasons supporting the motion.

The matter involved in this case is the action of the lower court in sustaining the validity of two orders entered by the Interstate Commerce Commission on November 4,

1929, and July 30, 1929, respectively (Exhibits A and B to the petition (R. 3)),* requiring the appellants and other carriers of the country to "cease and desist . . . from the transportation or movement of private passenger train cars, including so-called office cars, of another carrier free or at other than published tariff rates", and amending the pass regulations of the Commission to conform therewith. These orders were entered in a proceeding brought on the Commission's own initiative and designated as Docket No. 17757, "In the Matter of Use of Private Passenger Train Cars," reported in 155 I. C. C. 775.

Appellants were plaintiffs below, and brought this suit against the Commission and the United States under the provisions of the Urgent Deficiencies Appropriation Act of October 22, 1913, in the Western Division of the Western District of Missouri, to enjoin, set aside, annul and suspend said orders, in part only. Plaintiffs alleged that the said orders, in so far as they prohibit the movement by one carrier of the office car of another company, when occupied exclusively by the officers and employees of the latter company, traveling upon business in connection with the operation of the railroad of such latter company, upon such terms of compensation for the movement of the car as the interested carriers may mutually agree upon, were outside the scope of the Commission's power and authority, were arbitrary and unlawful, were unsupported by substantial evidence; and that their enforcement will constitute a denial

* References are made to pages of the certified unprinted record prepared by the clerk of the District Court and on file with the clerk of this Court, as the record has not yet been printed.

of plaintiffs' right to make lawful use of its property, a denial of plaintiffs' liberty of contract, and a denial of due process of law, all in violation of the Fifth Amendment to the Constitution; as fully specified in plaintiffs' petition (R. 3) and in the assignment of errors (R. 47). It was not sought to modify or disturb said order in any other respect.

The district court, composed of three judges as required by law, denied all the contentions of plaintiffs and entered an order or decree dismissing plaintiffs' petition (R. 44), from which action plaintiffs have taken this appeal to this Court (R. 45). The case was docketed in this Court on October 18, 1930.

The reasons why the case should be advanced are the following:

It is provided in the said Urgent Deficiencies Appropriation Act of October 22, 1913, that the final judgment or decree of the district court in cases brought to enjoin, set aside, annul or suspend, in whole or in part, an order of the Interstate Commerce Commission, may be reviewed by the Supreme Court of the United States upon appeal, and that appeals in such cases shall have priority in hearing and determination over all other cases in said Court except criminal cases.

The said orders of the Commission became effective according to their terms on January 15, 1930, but the effective date was postponed by the Commission until September 1, 1930, on which date they went into effect, and are now in effect.

WHEREFORE, appellants move that the case be advanced and set down for argument at as early a date as practicable.

Respectfully submitted,

FRANK H. MOORE,
CYRUS CRANE,
Solicitors for Appellants.

SAMUEL W. MOORE,
of Counsel.

October 24, 1930.

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APPEAL FROM UNITED STATES DISTRICT COURT FOR THE WESTERN DIVISION OF THE WESTERN DISTRICT OF MISSOURI.

JURISDICTIONAL STATEMENT FOR APPELLANTS UNDER RULE 12.

FRANK H. MOORE,
CYRUS CRANE,
Solicitors for Appellants.

SAMUEL W. MOORE,
Of Counsel.

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Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DIVISION OF THE WESTERN DISTRICT OF MISSOURI.

JURISDICTIONAL STATEMENT FOR APPELLANTS UNDER RULE 12.

The appellants, in support of the jurisdiction of this Court to review the above-entitled cause on appeal, respectfully represent:

A. The Statutory Provisions Sustaining Jurisdiction.

Section 238 of the Judicial Code, as amended by the Act of February 13, 1925, Ch. 229, 43 Stat. 936, 938 (28 U. S. C. A. 345), provides as follows:

> A direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following Acts or parts of Acts, and not otherwise:
>
> (4) So much of "An Act making appropriations to supply urgent deficiencies in appropriations for the fiscal year 1913, and for other purposes," approved October 22, 1913, as relates to the review of interlocutory and final judgments and decrees in suits to enforce, suspend, or set aside orders of the Interstate Commerce Commission other than for the payment of money.

The Urgent Deficiencies Appropriation Act of October 22, 1913, Ch. 32, 38 Stat. 208, 219-220 (28 U. S. C. A. sec. 41 (28), 47 and 47a), confers jurisdiction upon the district court of suits brought to enjoin, set aside, annul, or suspend "in whole or in part any order of the Interstate Commerce Commission," and, with respect to review by the Supreme Court of decrees entered in such suits, provides as follows:

> A final judgment or decree of the district court may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree, and such appeals may be taken in like manner as appeals are taken under existing law in equity cases.

B. Date of Decree, and Date of Application for Appeal.

The final decree sought to be reviewed was entered on September 19, 1930 (R. 44).* The application for appeal

---

* References are made to pages of the certified unprinted record prepared by the clerk of the District Court and on file with the clerk of this Court, as the record has not yet been printed.

was presented to the lower court on September 19, 1930 (R. 45). An order allowing the appeal was entered on the same day (R. 50). The cause was docketed in this Court on October 18, 1930.

C. Nature of the Case and Rulings Below.

The appellants were plaintiffs below and will be referred to herein as "the plaintiffs". They brought this suit in the lower court, under the Urgent Deficiencies Appropriation Act, to enjoin, set aside, annul and suspend, in part only, two orders of the Interstate Commerce Commission made on November 4, 1929, and July 30, 1929, respectively (Exhibits A and B to plaintiffs' petition (R. 3)), requiring the plaintiffs and other carriers "to cease and desist . . . from the transportation or movement of private passenger train cars, including so-called office cars, of another carrier free or at other than published tariff rates", and amending the Commission's pass regulations accordingly. The plaintiffs sought to set aside the said orders only in so far as they prohibit the movement of an office car of another carrier, upon such terms as the interested parties may mutually agree upon, when such office car is occupied exclusively by officers and employees of the company owning the car, traveling upon business in connection with the operation of their own railroad. When the words "office car" are used herein, they mean an office car so occupied and used. Plaintiffs did not seek to modify or disturb the order in any other respect.

The plaintiffs charged in their petition (R. 3) that neither they nor any of the other carriers of the country have ever held themselves out, by published tariffs or otherwise, as common carriers of office cars, and that they

had never handled office cars in the capacity of common carriers; that plaintiffs and other carriers own valuable office cars which for many years have been in daily use upon their own lines, and in occasional use upon foreign lines; that such office cars, so used, are necessary facilities in the operation of their railroads and in the transaction of their usual and customary business; that such office cars, when moved over the line of another carrier, are moved in each individual instance upon the special request of the company desiring the movement, which request such foreign line is at liberty to grant or refuse, and does grant or refuse, in its discretion; that the use of such office cars on foreign lines is not a matter in which the public is interested, or in which a public service is involved; that such movements of office cars are made by such foreign lines in their capacity as private carriers, and not in their capacity as common carriers, and, for that reason, the Commission is vested with no power or authority to regulate their movements or the terms on which such movements are made; that the interested companies have the constitutional right to use such office cars on foreign, as well as home lines, and full liberty to contract with such foreign lines with respect to the terms of such movements; and that this right to make lawful use of their property, and to enter into lawful contracts in reference thereto, can not be abrogated by the Commission, as it has sought by its orders to do.

It is also alleged that the movement of such office cars over foreign lines did not discrimnate against any member of the traveling public, and that there was no evidence before the Commission to justify its finding that such discrimination existed.

It was further alleged that the provisions of the Interstate Commerce Act relating to free transportation, and

the administrative rulings made by the Commission in reference thereto, together with the subsequent action and non-action of Congress in reference thereto, duly authorized and legalized the free movement of office cars over foreign lines.

The evidence before the lower court (R. 60) consisted of a certified transcript of all the evidence before the Commission, on which its orders were based, which both parties agree is typical of plaintiffs and other carriers, and which they agree is correctly summarized in the Commission's report in 155 I. C. C. 775; and also the testimony of the plaintiffs' president, who made a detailed statement of the practice in the movement of office cars over foreign and home lines, as such practice had existed for many years prior to the Commission's order herein; and also testified to the purpose and necessity of the daily use of such office cars on home lines, and to the purpose and necessity for their occasional use on foreign lines, in properly conducting the ordinary and usual business and operations of the carriers. The facts were practically undisputed. The controversy was over the legal conclusions to be drawn therefrom.

The lower court denied each and all of the said claims of the plaintiffs, and dismissed their petition (R. 44). Its opinion (R. 76) gives its reasons for its action. Errors were assigned by appellants (R. 47), with respect to the lower court's denial of each claim.

D. Cases Believed to Sustain the Jurisdiction of This Appeal.

The statute quoted above grants an appeal to this Court as a matter of right in cases of this nature.

Numerous decisions of this Court sustain its jurisdiction:

Chicago Junction Case, 264 U. S. 258;
St. Louis & O'Fallon R. Co. v. *United States*, 279 U. S. 461, 482;
Baltimore & Ohio R. Co. v. *United States*, 279 U. S. 784;
Akron, C. & Y. R. Co. v. *United States*, 261 U. S. 184, 189.

We respectfully submit that this Court has jurisdiction of this appeal.

Respectfully submitted,

FRANK H. MOORE,
CYRUS CRANE,
Solicitors for Appellants.

SAMUEL W. MOORE,
Of Counsel.

October 24, 1930.

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UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Appellees.

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BRIEF FOR APPELLANTS.

FRANK H. MOORE,
CYRUS CRANE,
Solicitors for Appellants.

SAMUEL W. MOORE,
Of Counsel.

December 22, 1930.

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Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DIVISION OF THE WESTERN DISTRICT OF MISSOURI.

BRIEF FOR APPELLANTS.

Statement.

Opinion of the lower court and the commission's report and orders.

The opinion of the lower court, which has not been officially reported, will be found in the record (R. 140). The report of the Commission (155 I. C. C. 775), which preceded the two orders in question, will be found in the record (R. 101). The two orders (R. 11, 13) are copied

in this brief as Exhibits A and B. Probable jurisdiction of this appeal was noted November 24, 1930.

The commission's orders, and the particular part thereof which is challenged in this action.

The Commission (three members dissenting), on November 4, 1929, and July 30, 1929, respectively (Exhibits A and B), entered two orders. As they deal with the same subject-matter and might have been embraced in one order, they will be collectively referred to herein as "the order". The first order, after making certain findings which will be referred to hereafter, required the appellants, who will be herein referred to as "the plaintiffs", and other carriers to "cease and desist . . . from the transportation or movement of private passenger-train cars, including so-called office cars, of another carrier free or at other than published tariff rates." No restriction was imposed upon the transportation or movement by a carrier of its own office cars upon its own line. The second order amended the Commission's pass regulations to conform to the foregoing requirement.

It will be noted that the Commission's order, evidently through inadvertence, is made by its terms to apply to intrastate movements, as well as interstate movements.

The plaintiffs do not seek to set aside the order in its entirety. They challenge it so far as it prohibits the movement of an office car of another carrier upon such terms as the interested parties may mutually agree upon, when such office car is occupied exclusively by officers and employees of the company owning the car and traveling upon business in connection with the operation of their own railroad. Whenever the words "office car" occur in this

brief, they mean an office car so occupied and so used. They also seek to challenge so much of the order as purports to regulate movements which are strictly intrastate. They do not seek to modify or disturb the order in any other respect.

Grounds upon which the challenged part of the order is alleged to be invalid.

Plaintiffs contended in the lower court (R. 1) and now contend here, that neither they nor any of the other carriers of the country have ever held themselves out, by published tariffs or otherwise, as common carriers of office cars, and that they have never handled office cars in the capacity of common carriers; that plaintiffs and other carriers own valuable office cars which for many years have been in daily use upon their own lines, and in occasional use upon foreign lines; that such office cars, so used, are necessary facilities in the operation of their railroads and in the transaction of their usual and customary business; that such office cars, when moved over the line of another carrier, are moved in each individual instance upon the special request of the company desiring the movement, which request such foreign line is at liberty to grant or refuse, and does grant or refuse, in its discretion; that the use of such office cars on foreign lines is not a matter in which the public is interested, or in which a public service is involved; that such movements of office cars are made by such foreign lines in their capacity as private carriers, and not in their capacity as common carriers, and, for that reason, the Commission is vested with no power or authority to regulate their movements or the terms on which such movements are made; that the interested companies have the constitutional right to use such office cars on foreign lines, when such

foreign lines consent thereto, and full liberty to contract with them with respect to the terms of such movements; and that this right to make lawful use of their property, and to enter into lawful contracts in reference thereto, cannot be abrogated by the Commission, as it has sought by its order to do.

Plaintiffs also contend that the movement of such office cars over foreign lines does not discriminate against any member of the traveling or shipping public, and that there was no evidence before the Commission to justify its finding that such discrimination exists.

Plaintiffs further contend that the provisions of the Interstate Commerce Act relating to free transportation, and the administrative rulings made by the Commission in reference thereto, together with the subsequent action and non action of Congress in reference thereto, duly authorized and legalized the free movement of office cars over foreign lines. This contention will not be argued at length in this brief, since it is involved and will be dealt with in the brief of appellants in the companion case, *Louisville & Nashville R. R. Co., et. al. v. United States and Interstate Commerce Commission*, No. 333.

These contentions were denied in the lower court, and plaintiffs insist that the lower court erred in so ruling.

Plaintiffs ask leave in this Court to amend their assignments of error so as to challenge so much of the order as purports to regulate the movements of office cars which are strictly intrastate.

Proceedings before the Commission.

The Commission, as stated by it (155 I. C. C. 775) (R. 101), instituted upon its own motion an investigation "con-

cerning the use of private passenger-train cars, including so-called office cars, in the transportation of persons." This investigation took the form of a questionnaire, which was sent out to all Class I and II carriers and to switching and terminal carriers, calling for information as to private passenger train cars owned, leased, or operated, the movement or use of such cars as were transported free or at less than tariff rates on home and foreign lines, and the occupants of such cars on respective trips. Returns were filed, under oath, by 387 carriers, covering the calendar years 1923, 1924, and 1925. The information thus secured was classified and tabulated and made the basis of the Commission's report and order.

It will be noted from an examination of the Commission's report, as a whole, that it contains no criticism whatsoever of the uniform and long continued practice of transporting office cars, we have defined them. Indeed, the Commission takes pains to approve the use of such office cars and to declare them to be "an important facility for carrying on the business of the road." It said (R. 108):

> The private cars of railroad officials are intended to be offices on wheels for those whose duties require considerable travel over the line and when used for that purpose are an important facility for carrying on the business of the road.

The Commission further points out, in line with our own contention, that it is seldom that movements of office cars over other lines is necessary, but that when such movements are necessary, they may be justified for business reasons. It adds to the statement last above quoted:

> It is seldom, however, that these duties necessitate a movement of the car over other lines. In

> some cases such a movement may be justified for business reasons; for example, where it avoids a very circuitous haul over the home line.

The Commission, in this last quotation, was speaking of the free movement of office cars over foreign lines. It does not say that such movements should be prohibited, or that they should be made only at tariff rates. It concedes that such movements may properly be made, provided only they are limited to such as are necessary and justified by business reasons. The Commission truly says that such movements are not the rule, but the exception, and that they occur only seldom or occasionally. It seems reasonable to assume that the Commission would have excepted office car movements from the scope of its order except for the fact that it reached certain legal conclusions in reference thereto, which we regard as erroneous. They are referred to below.

The Commission's report is devoted, almost entirely, to a consideration and condemnation of the use of private cars for other than legitimate purposes; that is, to their use by others than officers and employees of the carriers. This is shown by the Commission's statement (R. 102):

> The returns to the questionnaire show that the occupants of private cars are not restricted to officials and employees of the carriers but include in a large number of cases the families, relatives, and friends of railway officials traveling on passes or on tickets that would in most cases entitle them only to transportation in the ordinary coach.

Then follow illustrations of extensive movements of private cars by others than officers and employees (R. 103). It is said (R. 104) that there is a substantial use of private cars, both on home and foreign lines, by directors of car-

riers, and a substantial use of private cars for trips to Florida and other resorts. Reference is made (R. 105) to an extensive use of private cars by short lines, industrial roads, and lines owned, controlled, or used in the interest of some particular business. Attention is called (R. 107) to numerous instances where private cars were dead-headed to and from off-line shops without charge.

Then follows the statement above quoted, approving the use of office cars as an important facility for carrying on the business of the road, and justifying their occasional use on foreign lines; and, immediately after that statement, the Commission gives its conclusions, which evidently formed the basis of its order, as follows (R. 108):

> . . . But the returns to our questionnaire indicate that private cars are often used for other than business purposes by railroad officers, their relatives, and friends. Moreover, they appear to be used in some instances for the benefit of an industry which controls the railroad. In other instances, their use in entertaining shippers may be for the purpose of obtaining business for the railroad. These and other abuses are apparent from the returns, but we are here concerned primarily with the legality of the free transportation of private cars of other carriers. We will, therefore, proceed to a consideration of the law applicable to the subject.

It may be fairly said that the entire report deals with what the Commission regards as the abuses that have grown up in the movement of private cars, and that its order was intended to put an end to these practices. Not only was there no criticism of the proper use of office cars, but the Commission, as above stated, specifically approved the use of the office car on home lines and its occasional

use on foreign lines when necessary and justified by business considerations.

The Commission's view of the law applicable to the transportation of office cars, which, doubtless, caused it to include office cars within the scope of its order, will be dealt with in the brief. For present purposes, it will be sufficient to say that it reached the conclusion (R. 109) that "a passenger-train car is property"; and that one carrier can not lawfully transport the property of another carrier without exacting compensation therefor at published tariff rates. This view, as applied to the movement of an office car, is necessarily predicated upon the assumption that such office car is being transported by the common carrier in the performance of its public duties as a common carrier. We shall point out later our reasons for our belief that this assumption is entirely erroneous.

The Commission also found that it was unjustly discriminatory, unduly preferential and prejudicial to haul the private cars of other carriers free or at less than published tariff rates, while making a charge of 25 fares for the movement of special, privately owned, or chartered cars, which move at published tariff rates. We contend in the brief that there was no evidence to support a finding of discrimination in the movement of office cars; and further that there can be no discrimination against members of the shipping or traveling public in the free movement of office cars, in which the shipping or traveling public have no interest, and in hauling special, privately owned or chartered cars at tariff rates, which are available to the public generally.

The facts disclosed by the record.

We are not advised of any controversy over the facts. They appear in the Commission's report (R. 101) and in the testimony of Mr. Johnston, plaintiffs' president (R. 93-98). We give a brief summary of them, so far as deemed material to a consideration of the issues.

Plaintiffs are the owners of five office cars, of an aggregate value in excess of $200,000.00. These cars are literally "offices on wheels". Each officer to whom an office car is assigned has in the car, when in use, current correspondence, office files, blue prints, map cases, desks, tables, etc.; in fact, he has all the facilities in the car for performing his usual duties that he has in his office at headquarters. There are also eating and sleeping accommodations for the officers and their clerical force. Most of the officers conduct more actual office work while on the road in their cars than they can in their office at headquarters, because they can work there without interruption. One or more of the office cars are in service on the lines of the plaintiffs' railroad almost every day in the year. They are very necessary and play an important part in the operation of the railroad.

It is necessary upon occasion to move the office cars of a railroad, a railroad like that of the plaintiffs, over foreign lines in connection with the business of the company, when the office car is occupied by officers and employees transacting their usual daily business. The necessary movements over foreign lines, however, are only occasional. Judging from the past, a maximum use of the office cars of the plaintiffs on foreign lines would be three times a month. Such movements over foreign lines to this extent would be essential and necessary in the business of the

company. This practice of using office cars on home and foreign lines has existed for a great many years, practically ever since the advent of the steam railroad.

Illustrations of the movements of office cars over foreign lines which are regarded as necessary in transacting the business of the company are given. There are many meetings of railway executives in Chicago, called to discuss rates, labor schedules, and for many other purposes in which all are interested generally, and in which each is interested in behalf of his own line. There are also many similar meetings at St. Louis. These two cities are the headquarters of a considerable number of railroads, and for that reason are more convenient meeting places. Plaintiffs road is the only one having its headquarters in Kansas City, Mo. For attending these meetings an office car is frequently essential in the economy of time. The transaction of an officer's daily duties continues in the office car in the same manner as if he were at home. If, for illustration, the officer is called from Chicago at the end of a conference there to keep an appointment on the line of his railroad at Shreveport, La., he goes there direct from Chicago in his office car, and avoids the loss of time which would be required in returning to Kansas City and then going from there to Shreveport, thus saving a day and also avoiding any interruption in his work. Another illustration of the use of office cars on foreign lines is found in the movement between Kansas City, the operating headquarters of plaintiffs, and New York, where meetings of the board of directors are held, where the chairman of the board resides, and where the president of the plaintiffs, as a director, is required to go occasionally to attend board meetings and to discuss and solve many problems of railway operation. There is also a similar movement from New York to Kansas

City when the chairman of the board and one or more directors make their annual inspection trip over the lines of the plaintiffs. An office car is essential for this purpose, since there must be current correspondence, office files, blue prints, etc., available for consideration and determination of programs of construction, improvements and operation and generally for the transaction of the business of the year. The officers of a carrier cannot conduct its business in a Pullman berth or in a drawing room with anywhere near the convenience and facility offered by an office car, since there is no room for office files and office equipment.

There are not now, and never have been, any published tariffs covering the movement of office cars, except as such tariffs may have been put in since the effective date of the Commission's order herein in obedience to its command. Office cars have never been moved under published tariffs. The scope and the purpose of the Commission's order herein is to require carriers to publish tariffs covering the movement of office cars or private cars generally, or to abstain from such transportation.

There are published tariffs which provide for the movement of "special, privately owned or chartered cars for the exclusive use of special parties" (R. 113). This is a revenue service available to the public generally, which may be demanded as of right. Any member of the public owning a private car, or having chartered one, may demand, as of right, the transportation of the car under the tariff on payment of the tariff charges. Any carrier refusing to transport the car would be compelled by the courts to render the service. The ordinary charge for the movement of chartered cars of this character is 25 adult fares, with a minimum of 10 adult fares for the movement of the car empty, in charge of porter or other attendants.

The tariff for chartered cars has no application to the movement of office cars. The Commission itself says (R. 114):

> The term privately owned cars is not defined in the tariffs, but its obvious meaning is cars owned by others than the carriers.

The movement by one carrier of the office car of another is always made upon the request in each individual instance of the carrier desiring the movement. This is admitted by the Commission in its answer. If the plaintiffs desire a car moved from Kansas City to Chicago, for illustration, they address the officer of the line over which the movement is desired, saying, in substance: "If entirely consistent, will you kindly arrange movement of car so-and-so between such-and-such points". The request is usually granted, although that is not always the case. The carriers assume no duty to move officer cars for all who apply. The right to grant or refuse the movement is always reserved. Office cars constitute no part of the transporting carrier's passenger equipment and are not available for use by passengers generally.

If office cars can only be moved under the tariff applicable to chartered cars, plaintiffs will be deprived to a certain extent of the use of their office cars. The use of office cars would be very much restricted. Office cars have been moved by the carriers in the past gratuitously, as a matter of reciprocal accommodation.

The Commission points out that freight cars, and to some extent passenger cars, move freely over foreign lines; and it states the terms on which such cars are handled (R. 112, 113). The freight cars in service are generally interchanged between the principal carriers, not under pub-

lished tariffs, but under rules of the American Railway Association. The carrier in possession of the car pays the owning line a certain amount for each day the car is on its line. This is the per diem charge, and is in the nature of rent for the use of the car. It is paid whether the car is loaded or empty. Freight cars in regular service are not subject to transportation charges. The per diem charge above referred to is not a tariff charge, but is an intercompany arrangement, controlled by contract.

The tariffs provide certain charges per car per mile for the transportation of all kinds of railway equipment on their own wheels when they are moved from the place of manufacture to the home line before being placed in service; also on cars moved empty to and from repair shops off the home line, and on any other movements over foreign lines when not in regular service. When a car is being handled for revenue purposes, it is in service, and not subject to tariff or other charges; but when it is transported solely for the benefit of the owning line, the latter must pay for such transportation on another line. The transportation services for which charges are made are covered by published tariffs.

Privately owned freight cars are also used by the carriers in transporting property of the owners. An allowance of so much a mile is paid to the carrier by the owner for the use of the car. This is a matter of agreement between the parties. No tariff or other charge is made for the hauling of a privately owned car in service.

Passenger cars of one carrier are sometimes operated over the line of another carrier in maintaining through service. The terms on which this is done are a matter of contract, not covered by tariff. As in the case of freight cars, no tariff or other charges are assessed for the han-

dling of cars in service; but cars not in service are subject to the charges in the tariff.

These facts make it clear, plaintiffs contend, that railway companies are not common carriers of office cars; that when they transport an office car of another carrier they do so in the capacity of private carrier, with full power to contract in reference thereto; and that in the transportation of an office car free, or on such terms as the interested parties may agree upon, there is no prejudice to a discrimination against any member of the shipping or traveling public.

Proceedings in the lower court.

The case was heard and determined by a statutory court, under the provisions of the Urgent Deficiencies Appropriation Act. The evidence consisted of a certified copy of the questionnaire submitted to a large number of the carriers of the country, and their answers thereto, together with the oral testimony of plaintiffs' president. The court handed down a final decree, dismissing the plaintiffs' petition. Its opinion may be briefly summarized as follows:

Railroad companies hold themselves out as common carriers of "private cars", having established tariffs for the transportation of such cars; that is a part of their common carrier business, and is within the scope of their charter powers. Therefore, office cars are transported by railroad companies in their capacity as common carriers, and not in their capacity as private carriers, and such transportation is governed, not by private contract, but by tariff regulations.

It is not entirely clear how the lower court reached its conclusion that office cars are transported by railroad com-

panies in their capacity as common carriers. Evidently, it assumed that because tariffs are published for "special, privately owned, or chartered cars, for the exclusive use of special parties," it necessarily follows that these tariffs cover the transportation of office cars, although the Commission's specific finding, as well as the statements in defendants' answers, was to the contrary.

The court also held that the movement of an office car free or at less than tariff rates constituted unjust discrimination, the fact that the movement is free being alone sufficient evidence of discrimination. The court further denied plaintiffs' claim that the long-continued and uniform construction by the Commission of the Interstate Commerce Act, recognizing and providing a form for "car and party" passes for the movement of office cars over foreign lines, together with the action and non-action of Congress in reference thereto, had legalized such movements.

We believe that the lower court's determination of the issues was erroneous, and we have set forth in our brief the reasons for so believing.

Specification of errors.

1. The lower court erred in holding that the movement, over a foreign line, of an office car occupied by the officers and employees of the line owning the car, holding free transportation over such foreign line and traveling in the interest of, and in connection with the operation of their road, constitutes a common carrier service, for which the Commission may require or prescribe published tariffs, notwithstanding the conceded fact that the carriers of the country have never held themselves out by published tariffs, or otherwise, as common carriers of office cars so occu-

pied and used, and that movements of such office cars over foreign lines have always been made upon the special request, in each individual instance, of the line owning the car and desiring the movement, which request the foreign line is accustomed to grant or refuse in its discretion.

2. The lower court erred in holding that, because the railway companies of the country had published tariffs requiring a minimum number of tickets for the transportation of chartered or privately owned cars when used by the traveling public generally, such companies thereby became common carriers of office cars of other companies moving over their lines, even when such office cars were occupied by the officers and employees of the company owning the car, traveling on free transportation in the interest of and in connection with the operation of their own road, where such railway companies have never held themselves out by published tariffs or otherwise, as common carriers of office cars so occupied and used.

3. The lower court erred in refusing to hold that the movement over foreign lines of office cars, occupied and used as above stated, is a valuable railroad facility, essential to successful and economical operation, and as such is strictly an inter-company matter in which the public is not concerned, and over which the Commission has not been vested with power or jurisdiction.

4. The lower court erred in holding that there was any substantial evidence in the record to support the Commission's finding of undue preference or prejudice, or unjust discrimination, in the movement of office cars over foreign lines, when occupied and used as above stated, upon such terms as the interested parties may agree upon.

5. The lower court erred in holding that the free movement of an office car, occupied and used as above stated, is in itself sufficient evidence of discrimination.

6. The lower court erred in failing to hold the Commission's said orders void, in part, for the reason that the free transportation of an office car of one carrier by railroad by another carrier by railroad, where occupied and used as above set forth, is authorized by the provisions of the Interstate Commerce Act, and particularly Sections 1 and 22 thereof, and by the interpretations of such Act by the Interstate Commerce Commission and by the adoption of such interpretation by the Congress of the United States.

7. The lower court erred in entering the decree herein refusing to grant the relief prayed by plaintiffs in their petition in the above-entitled cause, and in dismissing said petition.

Request for leave to amend plaintiffs' assignment and specification of errors, or, in the alternative, that the Court notice a plain error not assigned or specified.

For reasons hereafter stated, the plaintiffs ask leave of the Court to amend their assignment and specification of errors by inserting an additional assignment or specification; or, in the alternative, they ask the Court to notice, as a plain error, the error so sought to be assigned and specified, which is as follows:

8. The lower court erred in not holding that the Commission's order, in so far as it purports to affect, control, or regulate strictly intrastate movements of office cars, is invalid because it is in violation of Sec. 1 (2) (a) of the Interstate Commerce Act, and also because it is in excess

of the powers conferred on the Federal government by the commerce clause of the Constitution (Art. I, Sec. 8).

ARGUMENT.

I.

A railway company, in the transportation or movement of an office car of another carrier acts in the capacity of a private carrier, or bailee, and retains full freedom of contract in reference thereto: and for that reason is not subject to the Commission's order challenged in this proceeding.

It will be seen from the preceding statement and from the summary of the decision of the lower court that the important question in this case is whether a common carrier, transporting the office car of another carrier, acts as a private carrier or as a common carrier; if the former, the right of contract as to the terms of the transportation exists.

For the purpose of our discussion under this heading, we accept the statement of the Commission that there are no tariffs covering the movements of office cars owned by carriers. Later, under a separate heading, we shall deal with the subject of tariffs and the lower court's apparent confusion in reference thereto.

It is true that the plaintiffs and other railway companies who have occasion to move the office cars of another carrier are ordinarily organized as common carriers, with corporate authority to act as common carriers for hire of both freight and passengers; but the fact that they are so organized, with broad charter powers, is of no legal

significance in determining the capacity in which they act in a particular instance. It has been authoritatively established that this question is not determined by charter powers, upon which the lower court laid considerable stress and which, no doubt, was the basis, in part at least, of its decision, but by the nature of the service performed in the particular case (*Terminal Taxicab Co.* v. *Kutz*, 241 U. S. 252; *United States* v. *Brooklyn Terminal*, 249 U. S. 296, 304; *Pacific Spruce Corp.* v. *McCoy*, 294 Fed. 411, 414; *State* v. *Public Service Comm.*, 275 Mo. 483, 493). The solution of our problem must be found, therefore, not in charter provisions, as the lower court seemed to suppose, but by a consideration of the nature of the service performed in the transportation of office cars.

It is to be borne in mind that the Interstate Commerce Act limits and restricts the Commission's power of regulation to those activities of railway companies which fall within the scope of their common carrier duties. Congress, in Section 1, paragraph (3), of the Act was careful to say: "Whenever the word 'carrier' is used in this Act it shall be held to mean 'common carrier'."

It is also to be borne in mind that, broad as is the power of regulation, neither the Congress nor the Commission enjoys the freedom of an owner. Railway properties, while subject to reasonable regulation in the public interest, are nevertheless held in private ownership. The management and right to control the business policy of each company belongs to it. Subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, common carriers are left as they were at the common law, free to manage their important interests

upon the same principles which are regarded as sound and adopted in other trades and pursuits (*Banton* v. *Belt Line Ry.*, 268 U. S. 413, 421; *Northern Pacific R. Co.* v. *North Dakota*, 236 U. S. 585; *Interstate Commerce Commission* v. *Chicago Great Western R. Co.*, 209 U. S. 108; *Interstate Commerce Commission* v. *Alabama Midland R. Co.*, 168 U. S. 144).

It is uniformly held that statutes regulating common carriers deal only with their common carrier activities, and do not apply to or control their private carrier activities (*Santa Fe R. Co.* v. *Grant Bros.*, 228 U. S. 177; *Terminal Taxicab Co.* v. *Kutz*, 241 U. S. 252; *Roberts on Federal Liabilities of Carriers* (1929), 2d Ed., Vol. I, at Sec. 310; 10 C. J., Sec. 759; *Sager* v. *Northern Pac. Ry. Co.*, 166 Fed. 526; *Ex Parte Alabama Great Southern R. Co.*, 206 Ala. 400; *Puget Sound Ry. Co.* v. *Kuykendall*, 293 Fed. 791).

It is well known that there are a large number of private carrier activities, including inter-company relations (referred to more at length under a subsequent heading) which do not affect the public with respect to either service or charges, and in which the public, therefore, is not concerned, and over which it can not be claimed that the Commission has the power of regulation.

In the movement of the office car of another carrier, under the circumstances shown in this case, the transporting company, although a common carrier in most of its activities, is, nevertheless, a private carrier. The rule of law that a common carrier, in some particular instances acts in the capacity of a private carrier, free from many of the restrictions resting upon common carriers, has become too firmly established to be questioned now. In fact, the lower court concedes the correctness of this principle when it says (R. 141):

> Undoubtedly it is true that a common carrier also may be in some situations a private carrier. Terminal Taxicab Company *v.* Kutz, 241 U. S. 252; Santa Fe Railway *v.* Grant Bros., 228 U. S. 177; Chenery *v.* Employer's Liability Assur. Corp. (9 C. C. A.), 4 Fed. (2d) 826; Railroad Company *v.* Lockwood, 17 Wall. 357. It is true that notwithstanding the Interstate Commerce Act such a common carrier as a railroad company may in some situation contract to carry both persons and property as a private carrier. Santa Fe Railway *v.* Grant Bros., *supra;* Chenery *v.* Employer's Liability Assur. Corp., *supra.*

We contend that this conceded principle applies to and controls the instant case. It will be helpful, therefore, to examine the decisions of this and other courts to make it plain that the facts in the present case bring it within the rule.

An early statement by this Court of the rule which we invoke is in *New York Central R. Co.* v. *Lockwood,* 17 Wall. 357, 377, where it is said:

> A common carrier may, undoubtedly, become a private carrier, or a bailee for hire, when, as a matter of accommodation or special engagement, he undertakes to carry something which it is not his business to carry. For example, if a carrier of produce, running a truck boat between New York City and Norfolk, should be requested to carry a keg of specie, or a load of expensive furniture, which he could justly refuse to take, such agreement might be made in reference to his taking and carrying the same as the parties chose to make, not involving any stipulation contrary to law or public policy.

This statement of the rule has been adopted without qualification by the courts and text writers alike. We contend that an office car movement is within the rule.

This Court's decision in *Terminal Taxicab Co. v. Kutz*, 241 U. S. 252, applying the same principle, is peculiarly applicable to the facts of this case, and may well be deemed controlling. There, the Taxicab Company, in the District of Columbia, was engaged in the performance of three services: first, in handling persons, by automobiles and taxicabs, to or from trains at the Union Station; secondly, in furnishing enough taxicabs and automobiles to meet the needs of the guests of certain hotels, with which it had an exclusive contract; and, thirdly, in furnishing automobiles from its central garage on orders, generally by telephone.

The Public Utilities Commission ordered the Taxicab Company to furnish it with a schedule showing all the rates and charges in force for any service performed by the Taxicab Company within the district, or any service in connection therewith. This is similar to the Commission's challenged order in this case. The Taxicab Company, asserting that it was only a private carrier, brought an action to restrain the Public Utilities Commission from exercising jurisdiction over it. The question for decision was whether the Taxicab Company, with respect to its activities above stated, was a common carrier, subject to public regulation.

This Court held that the Taxicab Company, with respect to its first two activities, was a common carrier and subject to the jurisdiction of the commission; but it also held that the Taxicab Company was a private carrier, and not a public carrier, in the performance of its other activities; and, hence, that the commission had no authority over that part of its business, and that it was not required to file its tariffs. The reasons assigned by the Court for holding that the company's garage business was not conducted as a common carrier, but as a private carrier, are of importance, since they are peculiarly applicable to the service

performed by the railway company in handling the office car of another carrier. The Court said (p. 255):

> The rest of the plaintiff's business, amounting to four tenths, consists mainly in furnishing automobiles from its central garage on orders, generally by telephone. It asserts the right to refuse the service, and no doubt would do so if the pay was uncertain, but it advertises extensively, and, we must assume, generally accepts any seemingly solvent customer. Still, the bargains are individual, and however much they may tend towards uniformity in price, probably have not quite the mechanical fixity of charges that attend the use of taxicabs from the station and hotels. There is no contract with a third person to serve the public generally.

The facts in the above-quoted statement are more persuasive evidence of a public employment than are the facts in the case under consideration. There, the Taxicab Company advertised extensively, thereby inviting the public to avail itself of the services offered. This, of course, is not the case in the handling of office cars.

The controlling fact in the mind of the Court, which led to the conclusion that the garage service was a private carrier service, appeared to be that "the bargains are individual", and the asserted "right to refuse the service". In other words, there was no holding out to the public of a readiness to serve all on terms of equality. The services offered were not such as any members of the public could demand as a matter of right, and for that reason there were individual bargains in each particular case. The same considerations apply to the movement of office cars. There is no obligation assumed to perform the service for any and all persons who may apply. An individual ar-

rangement is made in each instance, which the carrier called upon may grant or refuse in its discretion. The principle of the taxicab case applies, we respectfully submit, with persuasive and controlling force to the case under consideration.

This Court's decision in *Santa Fe R. Co.* v. *Grant Bros.*, 228 U. S. 177, emphatically asserts the principle for which we are contending. It holds that a common carrier may contract with a construction contractor, on such terms as they may mutually agree upon, with respect to the transportation of the cars containing the outfit of the construction company over the lines of the carrier in regular operation; and that the provisions of the law requiring published tariffs and prohibiting departures therefrom have no application to such a transaction. The rule that a common carrier, even as to matters involving transportation, may act in the capacity of a private carrier, with full liberty of contract in matters outside the performance of its duty as a common carrier, is thus stated (p. 187):

> Manifestly, this rule has no application when a railroad company is acting outside the performance of its duties as a common carrier. In such case, it is dealing with matters involving ordinary considerations of contractual relation; those who choose to enter into engagements with it are not at a disadvantage; and its stipulations even against liability for its own neglect are not repugnant to the requirements of its public service. The rule extends no further than the reason for it. It is apparent that there may be special engagements which are not embraced within its duty as a common carrier, although their performance may incidentally involve the actual transportation of persons and things, whose carriage in other circumstances might be within its public obligation. Baltimore & O. S. W. R. Co. *v.* Voigt,

176 U. S. 498, and cases cited; Northern P. R. Co. *v.* Adams, 192 U. S. 440; Long *v.* Lehigh Valley R. Co., 130 Fed. 870.

After referring to the *Voigt* case, in which it was held that an express messenger was not a passenger—that is, that the railway company was not a common carrier of the express messenger—the Court said (p. 186):

> In constructing, improving, or repairing its road, and in building its extensions and branches, the railroad company is providing facilities for its service as a common carrier, but, of course, is not acting as such.

In this connection, it will be noted that the officers and employees, in an office car moving over the line of another carrier, while not engaged in the physical construction of the road or its extensions and branches, are, nevertheless, performing their duties in connection with the operation of the road, which are quite as essential to the performance of its public service. They are improving and facilitating its service as a common carrier.

The Court adds (p. 188):

> The parties, then, were free to make their own bargains as to this transportation and the liability which should attach to it.

The Court also held that the terms of the compensation received by the railway company for the transportation involved, although less than tariff rates, were not to be governed by published tariffs, and did not constitute such a departure from published tariffs as amounted to a violation of the law. It said (p. 188):

> It is clear that in dealing with transportation of this character over its own road, in connection with

> construction or improvement, a railroad company is not acting in the performance of its duty as a common carrier, and the arrangement for free or reduced-rate carriage for the necessary materials and men used in the work, when it is a part of the contract, entered into in good faith, and not as a subterfuge, is not obnoxious to the provisions of law prohibiting departures from the published tariffs, for the reason that such an agreement lies outside the policy of these provisions.

The controlling considerations underlying this decision are equally applicable to the instant case. It is the policy of the law to impose upon common carriers public duties in favor of such members of the public as are entitled to demand their services in the particular matter. This is aptly expressed in *Atchison R. Co.* v. *Tiedt*, 196 Fed. 348 (certiorari denied, 225 U. S. 702), as follows:

> While a carrier in general has a duty to serve the public, the right to be served is in the public as such, and arises only when some individual demands a service that is common and due to him as a member of the public.

The essential feature of these public duties, without which they do not exist, is that common carriers hold themselves out as ready to perform specific services in the transportation of persons and property upon the same terms and conditions for all who may apply, up to the limit of the capacity of their facilities. For this purpose tariffs are published and all forms of favoritism and discrimination are prohibited.

But the policy of the law and the rules for its enforcement extend no further than the reason for them. Where a carrier performs services which are not public in nature,

that is, not offered to the public at large, the rule ceases to have any application. There is no necessity for published tariffs, for the reason that the public is not affected or concerned. Private contracts or arrangements may be made, and public policy protects them. In the case above cited, the carrier had not held itself out as a carrier of cars containing the outfits of construction companies. That was outside the scope of its public duties. It transported such cars only upon request in each individual instance, and upon terms mutually agreed upon, practically in the same manner as office cars are handled.

It is true that, in the case cited, the transportation was over the carrier's own line; but the underlying principles of the decision have equal application where the transportation is over the line of another carrier. The essential and controlling fact in the movement of an office car over a foreign line is that there is no holding out to the public of a readiness to transport for all, without which there is no public undertaking and no occasion for published tariffs or a uniformity of charge. In other words, the transportation is outside the scope of its public duties.

It is fully recognized by Congress that the duties of officers and employees of one carrier, in the proper operation of their own road, necessarily take them upon occasion over the lines of other carriers. This is plain from the provisions of Section 1, paragraph (7), of the Act, permitting "the interchange of passes for the officers, agents, and employees of common carriers." The same provision is in Section 22. No reason can be given for the interchange of passes between the officers, agents, and employees of common carriers except that they are required, in the necessary performance of their duties, to travel on other lines than their own. Congress recognized this fact and made

provision for it (*United States* v. *Erie R. Co.*, 236 U. S. 259).

The scope of a railway company's duties as a common carrier is limited and restricted to its undertaking; that is, to the extent to which it has held itself out, by published tariffs or otherwise, as ready and willing to perform certain services for all alike. Any service outside of its undertaking is a private carrier service. This principle is the basis of this Court's decision in the *Express Cases*, 117 U. S. 1, where it was sought to compel railway companies, as common carriers, to accept express matter and express messengers of other companies than the one having existing contract relations. The Court held that it was not the duty of carriers to furnish express facilities to all express companies which might demand them. It was put upon the ground that common carriers have not held themselves out as common carriers of express companies, just as, in the present case, the plaintiffs and other carriers have not held themselves out as common carriers of office cars. The Court stated the precise question for determination, as follows (pp. 21, 26):

> But it is neither averred in the bills nor shown by the testimony that any railroad company in the United States has ever held itself out as a common carrier of express companies, that is to say, as a common carrier of common carriers. On the contrary it has been shown, and in fact it was conceded upon the argument, that down to the time of bringing these suits, no railroad company had taken an express company on its road for business except under some special contract, verbal or written, and generally written, in which the rights and the duties of the respective parties were carefully fixed and defined.

> The exact question then is, whether these Express Companies can now demand as a right what they have heretofore had only as by permission. That depends as is conceded, on whether all railroad companies are now by law charged with the duty of carrying all express companies in the way that express carriers when taken are usually carried, just as they are with the duty of carrying all passengers and freights when offered in the way that passengers and freight are carried. . . . If they are entitled to the relief they ask it is because it is the duty of the railroad companies to furnish express facilities to all alike who demand them.

The railway companies were held not to be common carriers of express matter, or of express messengers, not only because they had never held themselves out as common carriers of express companies, but for the further reason that no railroad company had taken an express company on its road except under some special contract, precisely as it appears here that no carrier has ever taken and moved the office car of a foreign line except under some special contract or special arrangement.

The *Express Cases* were reaffirmed in *Baltimore & Ohio S. W. R. Co.* v. *Voigt*, 176 U. S. 498, where it is held that an express messenger, occupying an express car in charge of express matter, in pursuance of a contract between a railway company and an express company, was not a passenger, within the meaning of the rule of public policy which denies the validity of contracts limiting the liability of a carrier to a passenger for negligence.

The Court in the *Voigt* case referred to and apparently approved a number of cases, pointing out the line of demarcation between services performed by railway companies when acting in their common carrier capacity and

when acting as private carriers. In general, it is said that where the duty of transportation, whether of persons or property, is one which may be demanded as a matter of right, the public or common carrier duties of a railway company are involved. On the contrary, where the carriage cannot under the law be demanded as of right, the service is performed in a private carrier capacity.

Among the cases so cited and apparently approved is *Coup* v. *Wabash R. Co.*, 56 Mich. 111. There the railway company contracted with a circus proprietor to move a circus train. An accident occurred through the negligence of the railway company and an action was brought for damages. The contract under which the movement took place provided that the railway company should not be liable for damages, and this contract was upheld. The decision turned upon the fact that the railway company was not acting in its capacity as a common carrier, but as a private carrier, and hence was lawfully entitled to make such contracts as the parties might agree upon. The Court said:

> . . . But it is not incumbent on companies, in their duty as common carriers, to move such cars except in their own routine. They are not obliged to accept and run them at all times and seasons, and not in the ordinary course of business.
>
> It cannot be claimed on any legal principle that plaintiff could, as a matter of right, call upon defendant to move his trains under such circumstances and on such conditions; and if he could not, then he could only do so on such terms as defendant saw fit to accept.

Another case cited and apparently approved in the *Voigt* case is *Griswold* v. *New York & N. E. R. Co.*, 53 Conn. 371, where a restaurant keeper had the privilege to sell fruits and sandwiches on the trains and to engage and

keep a servant for that purpose on the trains, riding on a free pass. It was held that such servant could not recover for injuries received on the train caused by the negligence of the company's servants, because he was not a passenger. The decision was put upon the ground the railway company was not acting in the capacity of a common carrier, the Court saying:

> In the first place, the arrangement between the parties ought not to be regarded as a contract with the railroad company in its character as a common carrier, and therefore the stipulated exception is no abdication of that rigid responsibility which the law imposes on common carriers.

The Court in the *Voigt* case also cites, with apparent approval, *Robertson* v. *Old Colony R. Co.*, 156 Mass. 506, which was an action brought for personal injuries caused to the plaintiff, an employee of the proprietors of a circus, while riding in a car belonging to the proprietors, drawn by the defendant company over its road under a written agreement, in which it was provided that the circus company should agree to exonerate and save harmless the defendant from any and all claims for damages to persons or property during the transportation, however occurring. It was held that the plaintiff could not recover, and the decision was put upon the ground that the railway company was under no common law or statutory duty to carry the plaintiff in the manner he was carried at the time of the accident, and hence the parties were at liberty to contract as they did. In commenting upon this case, the Court in the *Voigt* case said (p. 515):

> . . . and it was held that, as the defendant company was under no common-law or statutory

> obligation to carry the plaintiff in the manner he was carried at the time of the accident, it did not stand towards him in the relation of a common carrier, and that the plaintiff could not recover.

The Court also referred to *Chicago, M. & St. P. R. Co.* v. *Wallace*, 66 Fed. 506, which was a circus case. The Court in its opinion in that case quoted and applied the following passage from *New York C. R. Co.* v. *Lockwood*, 17 Wall. 357:

> A common carrier may undoubtedly become a private carrier or bailee for hire when, as a matter of accommodation or special engagement, he undertakes to carry something which it is not his business to carry.

The Court in the *Voigt* case also referred to *Louisville R. Co.* v. *Keefer*, 146 Ind. 21, which was a suit by a messenger of the American Express Company against the railway company for personal injuries, and quoted from it as follows:

> Under the doctrine declared in the Express Cases, 117 U. S. 1, the property was being carried by appellant, not as a common carrier in the performance of a public duty, but being carried, with a messenger in charge, as a private carrier, the right to have it and him carried having first been secured to the express company by private contract, the only way known to the law by which the right, either as to goods or appellee as express messenger in charge, could be acquired.

In referring to *Pittsburgh R. Co.* v. *Mahoney*, 148 Ind. 196, the Court in the *Voigt* case said (p. 517):

> By the supreme court of Indiana, in Pittsburgh, C., C. & St. L. R. Co. *v.* Mahoney, 148 Ind. 196, it

was held that railway companies may contract as private carriers in transporting express matter for express companies, and in such capacity may require exemption from liability for negligence as a condition to the obligation to carry, and that a release by an employee of an express company of all liability for injuries sustained by the negligence of the employer or otherwise includes the liability of the express company to hold a railroad company with which it does business harmless against claims by the employees of the express company for injuries, and precludes an action against the railroad company for causing his death while in discharge of his duty as employee of such express company.

The Court's conclusion in the *Voigt* case is thus stated (p. 520):

> Without enumerating and appraising all the cases respectively cited, our conclusion is that Voigt, occupying an express car as a messenger in charge of express matter, in pursuance of the contract between the companies, was not a passenger within the meaning of the case of New York C. R. Co. *v.* Lockwood; that he was not constrained to enter into the contract whereby the railroad company was exonerated from liability to him, but entered into the same freely and voluntarily, and obtained the benefit of it by securing his appointment as such messenger; and that such a contract did not contravene public policy.

The holding of the English courts is to the same effect:

> *Lord Halsbury's Law of England,* Vol. 4, p. 2;
> *Johnson* v. *Midland R. Co.,* IV Exch. 367;
> *Dickson* v. *Great Northern R. Co.,* 18 Q. B. D. 176.

In the last-cited case the Court of Appeals decided that a railroad company was not a common carrier of dogs, for the reason that it had never held itself out as a common carrier of them. The statement of a railway company's common carrier obligations is so clear that we venture to quote the following:

> Lindley, L. J., said at page 183:
>
> At common law no person is bound as a common carrier to carry any goods of a kind which he does not profess to carry. Unless he professes to carry dogs for people in general, he is not bound to carry a dog for any particular individual; and if a carrier says he will not carry dogs except on certain terms, he can lawfully refuse to carry any particular dog on any other terms. In this case the defendants expressly say they are not common carriers of dogs and will not carry dogs except on their own terms. The common law, therefore, does not oblige the company to carry dogs at all; and at common law no action will lie against the company for refusing to carry a dog. Moreover, as no person is bound to enter into an agreement with one person simply because he is in the habit of entering into similar agreements with others, a company which is not a common carrier of dogs, but which may be in the habit of carrying dogs on certain terms, may at common law decline to accept any particular dog, even on those terms, and may refuse to carry the dog at all, or may refuse to carry it except upon some other terms which the company may specify. At common law, therefore, it seems to me the defendants can lawfully refuse to carry dogs except upon their own terms.

Lopes, L. J., said at page 188:

> Generally, railway companies like other carriers were common carriers of goods which they were bound by statute to carry, or which they professed to carry, or actually carried for persons generally, but not of goods which they did not profess to carry, and were not in the habit of carrying, or only carried under special circumstances or subject to express stipulations limiting their liability in respect of them.

Numerous other decisions might be cited, holding that a common carrier engaged in the performance of common carrier services, in accordance with its public undertaking, may, nevertheless, in the particular matter in question, be a private carrier, performing a private carrier service, with the incidents attaching thereto, including the right of private contract. A few of these decisions will be briefly referred to.

In *Robinson* v. *Baltimore & O. R. Co.*, 237 U. S. 84, it is held that a railway company is not a common carrier, but a private carrier, of Pullman porters.

In *Pullman Co.* v. *Missouri Pac. R. Co.*, 115 U. S. 587, it is held that a railway company is not a common carrier of Pullman cars.

In *Black & White Taxicab Co.* v. *Taxicab Co.*, 276 U. S. 526, and *Donovan* v. *Pennsylvania Co.*, 120 Fed. 215, it is held that railway companies are not common carriers of passengers or baggage from their stations.

In *The Wildenfels*, 161 Fed. 864 (C. C. A., 2d), it is held that a "lighter hired exclusively to convey the goods of one person to a particular place for an agreed compensation is not a 'common carrier' with respect to such goods, but a 'private carrier,' and liable only as a bailee for hire."

In *Huniting Elevator Co.* v. *Bosworth,* 179 U. S. 415, it was held that the Terminal Association of St. Louis was under no obligation as a common carrier to accept in train loads freight arriving over the road of another carrier; and that it was under no duty as a common carrier to allow the use of its yard for all purposes of such other carrier.

In *Louisville & Nashville R. Co.* v. *West Coast Naval Stores Co.,* 198 U. S. 483, it was held that the defendant railway company never became a common carrier as to a wharf built by it in the harbor of the city, at the foot of a public street, for the purpose of more conveniently procuring the transportation of freight beyond its own line by such carriers as it might select; and that the use of such wharf could not be demanded by a shipper on the payment of reasonable hire, for the purpose of employing vessels of his own selection for the further carriage of his goods.

In *Shoemaker* v. *Kingsbury,* 79 U. S. 369, it was held that when contractors building a railroad operate a construction train and take on a passenger for hire, they are, as to such passenger, private carriers only.

In *United States* v. *Louisiana & P. R. Co.,* 234 U. S. 1, it is held that the owners and operators of an internal system of trackage, however extensive, were not common carriers.

In *Atchison R. Co.* v. *Tiedt,* 196 Fed. 348 (certiorari denied, 225 U. S. 702), it was held that a common carrier is under no obligation, in its capacity of a common carrier, to operate a special train for a group of persons to which the public generally is not admitted, to be run on particular days and at particular hours to a suburban amusement park.

In 10 C. J., sec. 1066, p. 647, it is stated that "a carrier is not bound to receive or transport passengers on special trains or cars running for the particular purposes of the road, and not for the convenience of the traveling public."

In *Bankers Casualty Co.* v. *Minneapolis R. Co.*, 117 Fed. 434, (C. C. A., 8th) it was held:

> A railway company carrying U. S. Mails, whether under contract or by virtue of the requirements of the constitutional law, is not, with respect to such service, a common carrier.

In *Donovan* v. *Pennsylvania Co.*, 120 Fed. 215 (affirmed 199 U. S. 179), it was held that a railway company owes no common carrier duty to provide on its trains the opportunities for passengers to purchase newspapers, books, fruit, and the like, or to employ the services of a stenographer or of a barber, or to buy cab or express tickets.

In *Chenery* v. *Employer's Corp.*, 4 F. (2d) 826 (C. C. A., 9th), it appeared that Roberts and Ward were proprietors of a motor bus line operated as a common carrier on regular schedule between Papakura and Clevedon, 8 miles apart. In addition to operating the bus line between these points, they transported passengers to and from points beyond these towns, by special arrangement, consisting merely of a request for the transportation by telephone or otherwise and payment of the compensation agreed upon. This latter service was availed of by the plaintiff, who was injured in the course of the transportation, the point where the injury occurred being between the two towns where regular service was maintained. It was held that this was a private carrier service. The court said (p. 827):

> . . . Roberts and Ward were no doubt common carriers of passengers on their regular run between Papakura and Clevedon. It seems equally clear that they were mere private carriers when they undertook to carry passengers beyond their regular run by special arrangement or agreement.

In *Puget Sound International Ry.* v. *Kuykendall,* 293 Fed. 791, it is held:

> Electrical energy produced by a company which is not required for present needs of a public service may reasonably be called surplus, and its sale to private parties for power purposes is not subject to regulation by the Public Service Commission of Washington.

In *Meisner* v. *Detroit Ferry Co.,* 154 Mich. 545, the defendant was a common carrier of passengers by ferry between Belle Isle and certain cities. It purchased an island near the mouth of the Detroit River, developed it as an amusement park, and operated two of its boats twice daily between Detroit and the park, carrying excursions of various societies to the island. The court held that the service was a private carrier service, saying:

> The sole business in which the defendant is engaged with these boats is carrying passengers to and from its private pleasure grounds. . . . It is not engaged in the general carriage of passengers for business and pleasure. It invites such persons and parties as it chooses, and upon such terms as it chooses to make, to visit its own grounds, provided, as above stated, with the means of entertainment, amusement, and sport. It is in all essentials as private an enterprise as that of a theater, a circus, or a race track.

In *Houle* v. *Lewonis,* 140 N. E. 427, it was held that, while a truckman or teamster, holding himself out as a common carrier, will be liable as such, he is subject to the duties of a common carrier only within the territorial limits to which he devotes his common service.

In *Ney* v. *Haun*, 131 Va. 557, the defendant was licensed to carry goods in Bridgewater, but had not made a practice of trucking outside the town, although once before for the plaintiff's brother he had made a trip with his truck to Washington. The plaintiff engaged him to move his goods from Harrisonburg to Washington, and on the trip the goods were injured by the overturning of the truck. It was held not error to refuse a requested instruction of the plaintiff which rested upon a common carrier degree of liability.

The true test to determine whether the transportation is in the capacity of a common carrier or of a private carrier for hire is the existence or non-existence of a legally enforceable obligation to perform the service.

The real criterion, says this Court in *United States* v. *Louisiana R. Co.*, 234 U. S. 1, 24, is not the extent of the business, but "the right of the public to use the road's facilities and to demand service of it."

In *Hutchinson on Law of Carriers*, Vol. 1 (3d Ed.), Sec. 62, the author expresses this test in the following language:

> Lastly, the party must be under such a legal obligation to carry that an action will lie against him for a refusal without sufficient excuse. "The true test of the character of a party, as to the fact whether he is a common carrier or not," says Chief Justice Simpson, "is his legal duty and obligation with reference to transportation. Is it optional with him whether he will or will not carry, or must he carry for all? If it is his legal duty to carry for all alike who apply, with the terms as to freight, etc., then he is a common carrier, and is subject to all those stringent rules which, for wise ends, have long been adopted and uniformly enforced, both in Eng-

land and in all the states, upon common carriers. If, on the contrary, he may carry or not, as he deems best, he is but a private individual, and is invested, like all other private persons, with the right to make his own contracts, and when made, to stand upon them." "One of the obligations of a common carrier," says Nisbet, J., "is to carry the goods of any person offering to pay his hire; with certain specific limitations, this is the rule. If he refuses to carry, he is liable to be sued, and to respond in damages to the person aggrieved, and this is perhaps the safest test of his character."

In *4 Elliott on Railroads*, Sec. 2101, it is said:

> In other words, where there is a right to refuse to perform the services requested, there is a right to contract for their performance in a different capacity from that which rests upon a railroad company as a common carrier.

In *Fish* v. *Chapman*, 2 Ga. 349, 354, it was held that the liability to an action for refusal to carry is the safest criterion of the character of the carrier.

In *Ex Parte Alabama Great Southern R. Co.*, 206 Ala. 400, the court said:

> . . . Where there is a right of refusal by the common carrier to perform the service or act, there exists the right of contract for the performance of such act or service (if not *ultra vires*), in a different capacity from that which rests upon it as such common carrier. We apprehend that it cannot be successfully maintained that mandamus would lie against the Alabama Great Southern Railroad Company as a common carrier to compel it to park the cars of appellee for the period indicated, since such parking of such cars is not a duty it must discharge on application by

> any one of the general public, or by Mr. J. L. Wood, by reason of its being a common carrier.

To the same effect are:

> *Sante Fe R. Co.* v. *Grant Bros.*, 13 Ariz. 186, 192; *Schanen-Blair Co.* v. *Southern Pacific Co.*, 68 Ore. 106, 111.

The principles announced in the foregoing decisions received the Commission's approval in *Carr* v. *Northern Pacific R. Co.*, 9 I. C. C. 1, decided in 1901. There, the complainant, who had purchased a second-hand parlor car and fitted it up as "a traveling sample room," demanded the transportation of his car, with stop-over privileges at towns where business might be transacted, upon the same rate applicable to cars occupied by tourists, theatrical troupes, or other persons traveling in company. He was charged a higher rate and complained. The Commission said (p. 12):

> The defendant may decline to haul private cars at all, no matter by whom or for what purpose used, and a uniform rule to that effect would be entirely consistent with its public obligations. The defendant may also, as we think, haul private cars of a certain class, and refuse at the same time to haul others of a wholly or substantially different class.

The Commission also held that the complainant and his car constituted a different class from the others to whom a private car service had been extended, and that charging the higher rate did not constitute discrimination.

We feel that the decisions of this and other courts, as well as text writers, fully recognize the fundamental, underlying principles which establish the right of railway com-

panies to move each others' office cars to facilitate their operations upon such terms as they may mutually agree upon. This is a typical reciprocal service, where the carriers, as the lawful owners of their properties, have the right to make and conduct them in their own interest. They have assumed no obligations to the traveling and shipping public with respect to such movements. The public is not authorized or permitted to use these facilities or avail itself of this service. Because the service does not affect them, there can be no prejudice or discrimination. True, the movement of office cars in the past has been without charge, *eo nomine*. But, like the interchange of passes between carriers subject to the Act and those not subject to the Act, there may be "business reasons" which justify the exchange (*United States* v. *Erie R. Co.*, 236 U. S. 259, 271-272). In the same case, the lower court (213 Fed. 291, 295) explained the business reasons as "a desire to curry favor with persons having business to place"; and it characterized it as a "mutual backscratching" which had not yet been made sinful. Future movements of office cars, if this action is successful, may be gratuitous, or may be upon a basis of charges mutually agreed upon. The important thing is that, being a private carrier service, the parties have a lawful right to agree what the charges shall be, or that there shall be no charges other than the "business reasons" just referred to.

In the last analysis, the decisive and controlling question is whether the movement of an office car by and over a foreign line is an obligation, the performance of which can be compelled by the courts. No one will seriously contend that the carriers of the country have ever assumed any obligation to transport office cars for all who may apply. They have never held themselves out as common

carriers of office cars. Office cars have never been transported under tariffs, and there is no tariff applicable to such a movement. How can it be said, therefore, that there is an obligation to move office cars which courts will enforce by appropriate action? In all the cases above cited illustrating private carrier movements, it is obvious that such movements could not be coerced through the courts, for the simple reason that no duty or obligation exists to perform the service for the public generally.

Nor can a private carrier service be changed into a common carrier service by any legislative fiat, or by any order of the Commission. This principle is too well established to require argument (*Michigan Public Utilities Commission* v. *Duke*, 266 U. S. 570, 577; *Producers Transportation Co.* v. *Railroad Comm.*, 251 U. S. 228; *Wolff Packing Co.* v. *Court of Industrial Relations*, 262 U. S. 522).

II.

The lower court erred in holding that plaintiffs and other railway companies of the country are common carriers of the office cars of other carriers, and under a legal obligation, created by published tariffs, to accept and transport them thereunder.

We have shown that the duty of a common carrier to perform a particular service depends upon whether it has assumed an obligation, by published tariffs or otherwise, to perform such service for the public generally, and that the test of such public service is the right of some member of the public to demand and enforce a performance of the service by resort to legal process. We now proceed to point out that plaintiffs and other carriers have never assumed

any common carrier obligation to the public or to any one else to accept and move office cars; and that, as no such public obligation exists, the carriers are free to make such movements upon such terms as they may mutually agree upon, without coercion or restraint through the publication of covering tariffs. And we also point out what we regard as the error of the lower court in its holding to the contrary.

The lower court erred, we respectfully submit, in its holding that the movement of an office car over the line of another carrier is covered and controlled by published tariffs. Its ruling and the reasons for the ruling are thus stated (R. 142):

> It is not necessary to consider what might be the law if railroad companies did not hold themselves out as common carriers of private cars. They do. They have established tariffs for the transportation of such cars. That is a part of their common carrier business. It is within the scope of their chartered powers. As to such transportation therefore they cannot, if they would, divest themselves of the character of common carriers by any private contracts.

It should be noted, in passing, that the whole scope and purpose of the Commission's order is to require the railway companies to put into effect tariffs covering office cars, on the ground that the published tariffs now in force do not cover such movements; or, in the alternative, to abstain from the transportation of the office car of another carrier. The Commission's proceeding and order were quite unnecessary and futile if such tariffs have been in effect, as the lower court says they were.

We turn to the uncontradicted facts in the record, which, we contend, plainly and clearly refute the lower court's broad statement that the carriers have published tariffs

covering the movements of office cars. It will be borne in mind that the only tariff provision described by the Commission, and claimed by the court to cover office cars, is the one which provides for the movement of "special, privately owned, or chartered cars for the exclusive use of special parties." The Commission describes this tariff in the following language (R. 113):

> Special, privately owned, or chartered cars for the exclusive use of special parties are transported in passenger trains under tariffs which provide for certain minimum revenues.

The lower court bases its decision upon the assumption that this tariff provision covers the movement of office cars. But the facts speak emphatically to the contrary.

The Commission, whose particular province it is to construe tariffs, and whose construction carries great weight (*Emmons Coal Co.* v. *Norfolk R. Co.*, 272 U. S. 709, 712), held that the tariff provision did not cover office cars owned by railway companies. It ruled that this tariff provision applies only to cars owned by "others than the carriers"—which naturally means that it had no application to cars that are owned by carriers, such as the office cars in question. It said (R. 114):

> The term privately owned cars is not defined in the tariffs, but its obvious meaning is cars owned by others than the carriers.

Notwithstanding the Commission's plain ruling, the lower court states that the railway companies hold themselves out as common carriers of office cars, which are owned by the carriers, and that they have published tariffs for the transportation of such cars. This is the basis of

its decision. This erroneous ruling, we contend, is in itself sufficient evidence of prejudicial error against the appellants to require a reversal of the decree below. But there are additional reasons which lead to the same conclusion.

Both defendants in their answers, following the Commission's ruling, admit that the tariffs "do not expressly name charges on carrier-owned private or office cars transported by other carriers for exclusive use of the owning carriers or their officials." They also admit the facts which characterize a private carrier movement, made upon special request in each individual instance, and which distinguish it from a common carrier movement, made upon published tariffs open to the general public; namely, that it has long been the practice of carriers throughout the country to move office cars of other carriers without making any charge therefor, and that such movements have been upon special request; that such office cars do not become or constitute any part of the common carrier equipment of the transporting carrier, and that such cars are not available for the general use of passengers traveling over the line of such transporting carrier.

The Commission said in its answer (R. 19):

> Answering the allegation, in subdivision numbered 10 of the petition, that the tariffs of petitoners and other carriers do not provide for or cover the movement of the office cars of other carriers, the Commission alleges that the tariffs of petitioners and other carriers name certain minimum charges on privately-owned or chartered cars transported for the exclusive use of special parties, but the Commission admits that said tariffs do not define the term privately-owned cars, and admits that said tariffs do not expressly name charges on carrier-owned private or office cars transported for the exclusive use

of the owning carriers or their officials. Further answering said subdivision 10, the Commission admits that the movements over foreign lines of the private or office cars of other carriers have been made upon special request; admits that it has been the long-continued and uniform practice throughout the country to make such movements without making any charge whatsoever therefor; admits and alleges that such cars do not become or constitute any part of the common carrier equipment of such foreign lines; and admits and alleges that such cars are not available for the general use of passengers travelling on such foreign lines.

In the answer of the United States it is said (R. 14):

> It admits the allegation in said paragraph 10 that said tariffs of petitioners and other carriers do not expressly name charges on carrier-owned private or office cars transported by other carriers for exclusive use of the owning carriers or their officials, but alleges that said tariffs do name certain minimum charges for the transportation of privately owned or chartered cars transported for the exclusive use of special parties, and admits that said tariffs do not define the term "privately owned cars"; it further admits that it has long been the practice of carriers throughout the country to move private or office cars of other carriers without making any charge therefor; and admits and alleges that when so transported, such cars do not become or constitute any part of the common carrier equipment of the carriers transporting them; and further admits that such cars are not available for general use of passengers traveling on the lines of the transporting carriers.

These answers admit facts from which it necessarily follows that the movement of an office car, owned by a

carrier, over another line is, and always has been, a private carrier service, and that such movements have never been made under or pursuant to any published tariffs.

In the first place, it is conceded that the movements have been gratuitous; and it is clearly established that a carrier without hire is a private carrier (*Moore, Law of Carriers*, Vol. 1 (2d Ed.), Sec. 2, p. 2; *Hutchinson on Carriers*, Vol. 1 (3d Ed.), Sec. 16, p. 15; Sec. 61, p. 57; *Citizens Bank* v. *The Nantucket Steam Boat Co.*, 2 Story, 16, 35; *Chouteau & Valle* v. *Steam Boat St. Anthony*, 16 Mo. 216; 10 Corpus Juris, Sec. 15; *Northern Pacific R. Co.* v. *Adams*, 192 U. S. 440; *Self* v. *Dunn & Brown*, 42 Ga. 528; *Littlejohn* v. *Jones*, 2 McMullan's Reports, 365; *Knox* v. *Rives*, 14 Ala. 249; *Cincinnati* v. *Boal*, 15 Ind. 345).

In the next place, the published tariff is an offer to the traveling and shipping public to perform certain services for a stated compensation. When accepted, it becomes a contract, and is construed as other contracts are. The rule that if a contract be ambiguous, the practical construction placed upon it by the parties during a long period of time, before any controversy arises, will be given great weight, and in many cases controlling effect, applies with peculiar force here. "Tell me what you have done under such a deed and I will tell you what that deed means" (*Attorney General* v. *Drummond*, 1 Drury & Warren, 352). This rule has been emphasized in numerous instances by this and other courts (*Chicago* v. *Sheldon*, 9 Wall. 50, 54; *Topliff* v. *Topliff*, 122 U. S. 121).

For nearly a century, during which office cars have been in use upon the railroads of this country, it may safely be said that not one have ever moved under a published tariff, prior to the Commission's order in this case. No one has ever contended that such movements were governed by

tariffs, until the institution of this suit. It has been universally conceded by carriers and by the Commission, as well as by the traveling and shipping public, that such office car movements were private carrier movements, made upon request in each particular instance, either free or upon such terms as the interested parties might agree upon. This practical construction by carriers, public authorities, shippers and passengers alike over this long period of time necessarily excludes office car movements from the scope and effect of any published tariff whatsoever.

In the third place, if the question were one of first impression, instead of being foreclosed, as we contend it is, by the Commission's finding, by the facts stated in the defendants' answers, and by the long-continued construction placed by the interested parties, it is clear, from a consideration of the tariff provisions themselves, that they have no application to movements of office cars. The tariffs cover "special, privately owned, or chartered cars for the exclusive use of special parties" and represent the public undertaking of the carriers to transport such chartered cars and their occupants in regular revenue service for all members of the public who may apply therefor and pay the published charge; that is, for passengers for hire, holding—not free passes—but a minimum number of first-class tickets. It is a declaration by the carriers of their readiness to perform a common carrier service of a precise nature and for a specified consideration, which creates an obligation in favor of passengers for hire who comply with the conditions; and this obligation may be enforced in court, if necessary.

Manifestly, the movement of an office car does not come within the scope of this tariff provision. The office car, as the defendants specifically admit, is not a part of the com-

mon carrier equipment of the transporting company, and is not available for occupancy by passengers on the line of the transporting company. It is not now, and never has been, a service offered to the public by railway companies in their common carrier capacity. It is distinctly an inter-company transaction. It is a reciprocal arrangement, by which the business of the interested companies is mutually facilitated.

Doubtless, the lower court's error was induced by its unwarranted assumptions; first, that the published tariffs cover private cars; secondly, that an office car is embraced within the term "private car". It makes the unqualified statement in its opinion (R. 142): that railway companies do in fact hold themselves out as common carriers of "private cars". Then it assumes that an office car is a private car; and, upon this assumption, it reaches the conclusion that an office car comes under the tariffs.

There is no mention in the tariffs of "private cars". The nearest approach to it was the expression "privately owned cars", which the Commission said did not include cars owned by the carriers. The lower court's statement that the tariffs cover private cars cannot, therefore, be strictly accurate.

But even if we assume, for the sake of the argument, that the lower court was correct in its assertion that the published tariffs do cover "private cars". Do the words "private cars" include office cars? Certainly not. Office cars are carrier-owned cars. The standard definition of a private car is "in railroad terminology, a car not of railway ownership" (50 C. J. 371). See also *In the Matter of Private Cars*, 50 I. C. C. 652, 656; and *United States* v. *Berwind Mining Co.*, 274 U. S. 654, 658.

While the lower court did not so intend, its reasoning, in the light of the standard definition of a private car, must be deemed to run somewhat as follows: The tariffs cover private cars; that is, cars owned by others than the railway companies. Office cars are owned by railway companies, and hence they are covered by the tariffs. The fallacy of the argument is plainly evident and needs no comment.

III.

The transportation or movement of the office car of another carrier, upon such terms as the interested carriers may agree upon, cannot be unjustly discriminatory, or unduly preferential and prejudicial, since it is strictly an inter-company matter, in which no member of the traveling or shipping public is concerned, and in which no public interest is affected.

While carriers are held to a strict accountability for the performance of their "own immediate duties to the public" (163 U. S. 564, 589), and are not permitted to escape their responsibility therefor, the law places no limitation or restriction upon the methods or instrumentalities which they may adopt for the purpose of performing their public duties. It is well known that there are a large number of inter-carrier contracts and relations which aid and facilitate the performance of common carrier or public duties, but do not constitute any part thereof. Public regulation does not concern itself with these inter-company matters, since they cannot prejudice, or discriminate against any member of the traveling or shipping public.

We contend that the movement of an office car of another carrier is an inter-company transaction of a reciprocal

nature which facilitates the operation of the properties of the carriers involved and aids them in the performance of their public duties, but that such movements constitute no part of such public duties, and for that reason public regulation does not extend to them. Invoking this rule, we respectfully submit that there was no evidence before the Commission supporting its finding that it is unjustly discriminatory, and unduly preferential and prejudicial, to haul the office car of another carrier free or at less than published tariff rates, while charging certain minimum fares and revenues for movements of privately owned or chartered cars; and that the lower court erred in sustaining the Commission's finding in that behalf.

From the very beginning, it has been the constant practice of carriers to make such contracts and arrangements between themselves, and with other persons, as they deemed essential for the performance of their public duties. While the law exacted the strictest performance of these public duties, it has left the carriers substantially to their own devices, without compulsion or restraint, in the acquisition of property, in providing facilities, and in inter-company arrangements deemed mutually beneficial, by which the performance of their public duties may be aided and facilitated. These inter-company contracts and arrangements have never been considered a part of the carriers' public duties or subject to public regulation. The plain reason is that they do not affect any member of the shipping or traveling public, either with respect to charges or service. This finds illustration in *Santa Fe R. Co.* v. *Grant Bros., supra.*

A few of the many illustrations of inter-company relations will be referred to for the purpose of showing that they are outside, and independent of the carriers' public

duties, and that, for that reason, they cannot be said to create preference, prejudice or disadvantage to any member of the public.

It may be said, in passing, that the general right of the carriers to enter into these inter-company contracts has been recognized and sustained (*Union Pacific R. Co.* v. *Chicago, R. I. & P. R. Co.*, 163 U. S. 564, 589). In Missouri, where one of the plaintiffs is incorporated, the statute (Sec. 9911, Revised Statutes, 1919), putting the general rule into statutory form, expressly authorizes all railroad companies to "contract with each other, or with other corporations, in any manner not inconsistent with the scope, object and purpose of their creation and management." It has been held that this statute confers authority to contract by lease or operating agreement, or for a temporary permission or a parol license, to use and occupy the line of one company to expedite the trains of another (*St. Joseph R. Co.* v. *St. Louis R. Co.*, 135 Mo. 173).

A common form of the inter-company arrangement is the trackage contract, whereby one railroad is permitted to use the tracks and facilities of another carrier for the performance of its public duties (*Union Pacific R. Co.* v. *Chicago, R. I. & P. R. Co.*, 163 U. S. 564; *Chicago, R. I. & P. R. Co.* v. *Denver & Rio Grande R. Co.*, 143 U. S. 596; *St. Louis, K. C. & C. R. Co.* v. *Wabash R. Co.*, 217 U. S. 247). So long as the carrier enjoying the trackage rights performs its own immediate duties to the public in the transportation of freight and passengers, the public is not concerned with the terms of the contract between the two companies. The amount of rental paid and the terms under which the operations are conducted do not affect any member of the traveling or shipping public, either in the service performed or the rates, fares and charges paid. No one

has ever ventured to put forward the claim that the cars and engines of the company enjoying the trackage rights constitute property, as the Commission asserts of office cars in this case, and hence can only be moved over the rails of the other company at tariff rates.

While a carrier is under obligation to provide ample and proper equipment for the transportation of passengers and freight, the law does not concern itself with the means which the carrier employs to provide itselt with such equipment. It is a matter of no interest to public regulation whether the carrier purchases its own equipment or contracts with some other company to provide the equipment, under some form of lease or rental. A carrier may contract with another company to supply drawing room and sleeping cars (*Chicago, St. L. & N. O. R. Co.* v. *Pullman Southern Car Co.*, 139 U. S. 79, 89). It may contract with other persons to supply it with freight cars of various kinds and designs (*Assigned Car Cases*, 274 U. S. 564). So long as a carrier is supplied with equipment of the requisite number and quality, it is a matter of indifference to the public who owns it; and the terms of the contracts under which it is secured are likewise a matter of indifference to the public. The obvious reason is that these contracts do not in the slightest degree affect the charges paid or the services rendered to the public. Of course, this equipment is property: but no one has ever suggested that it can only move at tariff rates.

A carrier may lease a portion of its right of way or other property to private persons for elevators, warehouses, or other structures for their own benefit, provided it does not thereby disable itself from performing its public duties (*Hartford Fire Ins. Co.* v. *Chicago, M. & St. P. R. Co.*, 175 U. S. 91, 99). Here, again, no passenger or shipper

is affected, and for that reason such arrangements are beyond the scope of public regulation.

A carrier by railroad may grant to another carrier engaged in transporting oil by pipe line the right to lay its pipe lines along the roadbed, on such terms as the interested parties may agree upon (*National Transit Co.* v. *Davis*, 6 F. (2d) 729). The Court of Appeals, Third Circuit, held that no right possessed by any member of the public was affected thereby, and that the parties had a right to contract as they saw fit, saying (pp. 730, 733):

> Turning to the contract, which is the underlying feature of all questions involved, we note that such contract in no way concerned or affected the duty of the railroad as a common carrier. It was simply an agreement by which the transit company obtained permission to use the property of the railroad in carrying on its own business of transporting oil. Such being the case, it follows that no questions of public policy are involved in, or affected by, the contract, and therefore the parties are unhampered in their general right to contract with each other as they saw fit. . . .
>
> The contract in suit did not take away or lessen any right possessed by any member of the public.

A railway company may contract to transport ballast for another carrier for cost of transporting in work trains, instead of the amount fixed by tariffs, where the transporting carrier has an interest in the transportation (*Oklahoma Belt Ry. Co.* v. *Schaff*, 282 Fed. 138 (C. C. A., 8th)).

Both railway companies and express companies are held to strict responsibility for the performance of their public duties, but they may enter into inter-company contracts whereby express matter and express messengers are trans-

ported over the line of the railway company. The terms of these contracts do not affect or concern any passenger or shipper over the railroad, or any shipper of express matter, and hence are not subject to regulation (*Express Cases*, 117 U. S. 1).

It may well happen that a railway company may transport identical articles on the same day, and even in the same train; some of them in its capacity as common carrier and others under its contract with an express company. The railway company receives tariff rates for what it transports as a common carrier; and a lesser compensation, fixed, not by tariff, but by contract, for what it transports for the express company; but no one will contend that the railway company is thereby guilty of unjust discrimination or undue preference or prejudice. The shipper by express pays the published tariff rates of the express company, and the shipper by railroad pays its tariff rates. Neither is affected or concerned by the inter-company arrangements of the two companies, and neither can be prejudiced thereby.

A railway company owes its passengers the duty of providing a suitable way for them to reach and leave its station and grounds. It may perform this duty by an exclusive contract with a taxicab company and exclude from its station grounds all other taxicab owners. Such inter-company contracts give rise to no illegal discrimination (*Black & White Taxicab Co.* v. *Brown & Yellow T. Co.*, 276 U. S. 518). The terms of the inter-company contract are not a matter of public concern so long as the carrier's public duties to its passengers are complied with.

An apt illustration of an inter-company contract by which the carrier's public duties are aided and facilitated, but which, nevertheless, is no part of its public duties, is found in the standard form of detour agreement, a copy

of which appears as Exhibit C. This agreement provides for the operation of trains over the tracks of a foreign line when the operation of the home line is interrupted by washout or other temporary cause. The movement over the foreign line may be made with the engine and engine crew of the foreign line, or with the engine and engine crew of the home line. Charges for the service are fixed by agreement of the parties. Obviously, these charges do not affect the rates, fares and charges payable by shippers or passengers in accordance with published tariffs. They merely constitute a part of the expense payable by the carriers as an incident to the performance of their public service.

No one has ever suggested that these detour movements should be covered by published tariffs, for the obvious reason that neither the movement of the cars, nor the charges therefor, affect any member of the shipping or traveling public. No one has ever contended that the foreign line in moving the cars of the home line at less than published tariff rates was guilty of preference or discrimination, even though the equipment, as well as the contents of the cars when under load, constitutes property, to the same extent that an office car may be said to constitute property. The Commission has never undertaken to prohibit these movements except under published tariffs.

Another apt illustration of an inter-company contract by which carriers' public duties are aided and facilitated is to be found in the Commission's Conference Ruling No. 217, which provides for the return to destination of astray shipments billed to an erroneous destination or unloaded short of destination or carried by. The Commission ruled that the return of astray shipments may be made by carriers without assessment of charges, and upon such terms as are mutually agreeable; and without the filing of any

covering tariffs. The ruling, which was first promulgated on May 6, 1907, is as follows:

> Instances occur in which, through error or oversight on the part of some agent or employee, a shipment is billed to an erroneous destination or is unloaded short of destination or is carried by. The Commission is of the opinion that in *bona fide* instances of this kind carriers may return such astray shipments to their proper destination or course without the assessment of additional charges, and may arrange for such movement of such astray shipments for each other on mutually acceptable terms without the necessity of publishing, posting, and filing tariff under which it will be done.

Why does the Commission rule that astray shipments may be moved free or on such terms as the interested carriers may agree upon, and that no tariffs need be published, posted or filed to govern the movement? Obviously, for the reason that the return of astray shipments is purely an inter-company transaction which does not affect the public in the slightest degree. The charges paid by the shipper is neither more nor less by reason of the return movement of the astray shipment; nor is the matter of service affected in any degree. Manifestly, the return of astray shipments is not a common carrier movement; it is a private carrier movement, and, hence, the parties may contract as they please with respect thereto.

It may also be noted that the United States Postal authorities, who so jealously guard the postal revenues and severely punish any infractions of the postal laws and rules of the Department, nevertheless permit mail to be carried between connecting carriers outside of the mails and without the payment of postage, where such mails

affect the mutual business of the interested companies. In "Postal Laws and Regulations of the United States of America," edition of 1924, page 502, sections 1261, paragraphs 2 and 3 read as follows:

> 2. A railroad or steamboat company or other common carrier may carry outside of the mails letters written and sent by its officers and agents which relate to its business only, without inclosing the same in stamped envelopes. Such letters may be to other of such carriers' officers and agents, to those of connecting lines, or to anyone else, so long as no other carrier intervenes.
>
> 3. Letters of a company or carrier addressed to officers or agents of a connecting line on business relating to such company or carrier and delivered to an agent of the latter at the point of connection may be carried, and such carriage continued by the connecting company or carrier.

While no question of common carrier or private carrier is directly involved in the quoted regulations, they are, nevertheless, a clear recognition of the policy of the Government with respect to inter-carrier transactions and relations which are for their mutual benefit and which facilitate their operations as common carriers.

Why do not the rules and principles applying to inter-company contracts which aid and facilitate the carrier in the performance of its public duties apply with equal and compelling force to the movement of the office car of another carrier? The office car, it is to be remembered, is occupied exclusively by officers and employees of the company owning the car, engaged in the performance of their duties connected with the operation of their own railroad. They are facilitating the common carrier operations of

their railroad, quite as much as they would be if they were strengthening the roadbed or repairing the equipment. They are preparing the railroad for the better performance of its public duties.

Why may not the interested companies enter into inter-company contracts covering the movements of office cars? The advantages to the companies involved are manifest. The absence of prejudice to the public is equally manifest. The arrangement between the companies is reciprocal; one company may be benefited today, and the other one to-morrow. The extent of the service rendered, each to the other, may be equal, or it may be unequal. There may be, as pointed out above, other moving considerations besides the exact measure of the service rendered. Our contention is not that the service should be gratuitous in all cases, but that the parties should have full freedom of contract, to make their own bargains unhampered by the Commission's dictation.

How can it be said that any member of the shipping or traveling public is affected in the slightest degree, much less prejudiced or discriminated against? No member of the public has any right to travel in an office car, since that right is limited to officers and employees traveling on official business. No member of the public has a right to have an office car transported, as office cars are ordinarily transported, since that right is also limited to officers and employees traveling on official business.

How can it be said that the occupants of any special, privately owned, or chartered car, having their car moved under the tariff, upon the payment of 25 cash fares, are prejudiced or discriminated against by the free movement of an office car? No one will contend that they are prejudiced or discriminated against by the fact that the engine-

men, baggagemen, express messengers, train employees, and Pullman employees on the same train ride free. The latter are not traveling as passengers for hire, but as employees in the performance of their duties. They constitute a class separate and apart from passengers for hire. The occupants of an office car stand in precisely the same relation as the employees on the train. They also constitute a class separate and apart from passengers for hire.

Numerous illustrations of what constitute separate classes for transportation purposes might be given, and a few will be referred to.

In *Interstate Commerce Commission* v. *Baltimore & Ohio R. Co.*, 145 U. S. 263, it is held that a party rate ticket, which is a single ticket covering the transportation of ten or more persons, does not discriminate against ordinary passengers, although sold at a reduction from the regular passenger rates. The party of ten, traveling together, constitutes a different class from a party of ten, traveling separately.

In *United States* v. *Chicago & North Western R. Co.*, 127 Fed. 785, it is held that the Government, in the transportation of its soldiers in lots of ten or more, is not entitled to the benefit of a reduced ten-party rate, given by the railway company's schedule to "theatrical, operatic, or concert companies, hunting and fishing parties, glee clubs, brass or string bands, boat, baseball, polo, or tennis clubs, football teams, and other parties of like character." The decision is put upon the ground that the soldiers constitute a different class from the others enumerated. The Government "does not in any way come in competition of any kind with any of the parties who are given the party rates." In the same case, it is held that it has always been lawful at common law, as well as under the statute,

to allow ministers of the gospel to travel on half-fare tickets, for the reason, says the court, that "they do not come in competition with business men, and no injustice is done to anybody."

The Commission itself, in *Carr* v. *Northern Pacific R. Co.*, 9 I. C. C. 1, held that the owner of a second-hand Pullman parlor car, remodeled and fitted up as "a traveling sample room," was in a different class from "pleasure seekers, hunting and fishing parties, theatrical companies, and the like", and might be charged a higher price, without constituting preference or discrimination. Manifestly, there there is much greater reason in this case than in the cases cited to hold that officers and employees of a carrier engaged in the performance of their duties while traveling in an office car, constitute a different class from passengers for hire traveling in special, privately owned, or chartered cars.

The sole ground on which the Commission and the lower court predicated the finding of unjust discrimination and undue preference and prejudice was the fact that the office car movements in the past have been free, whereas the movements of special, privately owned, or chartered cars have been at tariff rates. This fact, says the lower court, "is alone sufficient evidence of discrimination" (R. 144).

Aside from the fact that a mere difference in charges does not constitute illegal discrimination (*Texas & Pacific R. Co.* v. *Interstate Commerce Commission*, 162 U. S. 197, 239), it is established that unjust discrimination, under Section 2 of the Act, deals with shippers, and requires substantial equality among shippers. It is said in *Wight* v. *United States*, 167 U. S. 512, 517, in speaking of Section 2:

> The wrong prohibited by the section is a discrimination between shippers. It was designed to

> compel every carrier to give equal rights to all shippers over its own road.

This is repeated in *Interstate Commerce Comm.* v. *Alabama Midland R. Co.*, 168 U. S. 144, 166, and in other decisions.

Clearly, a carrier, in requesting the movement of its office car over another line, is not a "shipper", any more than when it moves its equipment, or has it moved, over the line of another company under a trackage agreement; or when it moves its cars, or has them moved, over terminal tracks, or in terminal yards; or when it moves its cars over another line under a detour agreement; or when its passenger equipment, in service as well as "deadhead", moves over another line in joint service; or when its freight cars move over another line in a through route movement, under a joint rate; or when its astray shipments are moved free over the line of another carrier.

A shipper is a member of that public to which a common carrier service is offered, through the medium of published tariffs; he as an individual commands a service that is common and due to him as such member of the public (*Atchison, T. & S. F. R. Co.* v. *Todd*, 196 Fed. 348; certiorari denied, 225 U. S. 702). The same case holds that where an individual separates himself from the public and demands a use of a common carrier's property or facilities, not in the common right, but for his own profit or advantage, he is no longer entitled to common carrier service. In other words, he ceases to be a shipper or passenger.

It seems too clear for argument that a carrier desiring the movement of its office car by another carrier does not invoke the performance of any public duty which is owing to the public generally, and for that reason it is not a ship-

per. As to it, the transporting carrier assumes no common carrier duties; it is not an insurer, but a contractor, performing an inter-company service.

In order to constitute unjust discrimination, there must be discrimination against shippers, in a "like and contemporaneous service"; in the transportation of "a like kind of traffic, under substantially similar circumstances and conditions". It needs no extended argument to demonstrate that the office car service in question is wholly unlike the service performed in the movement of special, privately owned, or chartered cars. The traffic—if traffic it may be called, in the case of an office car—is essentially different, and the circumstances and conditions are fundamentally dissimilar.

The transportation of special, privately owned, or chartered cars is a common carrier service under published tariffs, available to the entire body of the public. Any individual can demand the service as a matter of right, upon the payment of the requisite 25 first-class fares. It is essentially a revenue movement; a commercial transaction entered into for the sake of expected profit. It is a service which the carrier can not refuse to perform. If it sought to do so, the courts would enforce performance. There is no limitation upon the class of persons who may occupy the car. There is no restriction whatever upon the purposes or objects of their journey. They may travel in the pursuit of business or for the mere sake of travel and recreation, as they may desire.

The office car, on the other hand, is not covered by any published tariffs. It is not a service available to the public, which any member of the public may demand as a matter of right. The carrier requested to make the movement may refuse to do so. In that event the courts are powerless to

compel performance. The service, when performed, is not a revenue movement, entered into for profit, but a matter of reciprocal service. The occupants of the car are limited to officers and employees, traveling upon business connected with the operation of their own railroad. They, by reason of their position, are provided with free passes, and no tickets are required. The purpose of the journey is to prepare the railroad of the owning company to perform its common carrier obligations and to facilitate an adequate transportation service. It needs but a moment's consideration to be convinced that the circumstances and conditions surrounding the two services are fundamentally dissimilar.

The undue preference and the prejudice condemned by Section 3 of the Act deal with the relative advantages and disadvantages of shippers, as between themselves. The terms employed by the statute imply that the prejudice exists against one shipper, which is a source of advantage to the other shipper alleged to be favored; and a competitive relation between the commodities in the case where discrimination is alleged is essential. This rule is consistently applied by the Commission in numerous decisions, some of which are as follows:

Miner v. *New York, N. H. & H. R. Co.*, 11 I. C. C. 422, 427;

Board of Trade v. *A., T. & S. F. R. Co.*, 29 I. C. C. 438, 443;

Calif. Walnut Growers Ass'n v. *A. & R. R. Co.*, 50 I. C. C. 558, 568;

Colgate & Co. v. *Tampa & J. Ry. Co.*, 144 I. C. C. 253, 257;

Sunderland Bros Co. v. *Chicago, B. & Q. R. Co.*, 148 I. C. C. 484, 486.

Manifestly, there can be no competition between a carrier desiring the movement of its office car over another line to aid and facilitate its own operations, on the one hand; and those desiring the transportation of a special, privately owned, or chartered car, for the exclusive use of ticket-holders traveling as passengers for hire, on their own business, or for their own pleasure, on the other. Competition is defined by the Commission, in *Transcontinental Rates*, 46 I. C. C. 236, as follows:

> Competition involves a striving between or among one or more persons or organizations for the same object.

How can it be said that a carrier desiring the movement of an office car to facilitate the operation of its road, is striving for the same object as those desiring the movement of a special, privately owned, or chartered car for their exclusive use? The object sought by the carrier is to better its railroad and improve its public service; and to accomplish that purpose it sends out an office car, occupied by its officers and employees. The movement of the car is a necessary step in facilitating the operation of the railroad. The occupants of the special, privately owned, or chartered car, on the other hand, are striving for quite a different object. They care nothing about improving or bettering the operation of the railroad in question, or any railroad. They are engaged exclusively in promoting their own business or pleasure. They may be a party of prospective purchasers being conducted to a distant point where lots or acreage property are offered for sale. They may consist of a man or woman of means, with family and friends, desiring the luxury of travel in their own exclusive car; or they may be any group traveling for business or for

pleasure. But, clearly, they are not in competition with a carrier sending out an office car for the purposes above stated.

We contend that there was no evidence to support the Commission's finding of unjust discrimination, or undue preference or prejudice, with respect to the movement of the office cars of another carrier. This being true, the Commission's order can not stand (*Chicago Junction Case*, 264 U. S. 258).

IV.

The Commission's order is clearly in excess of its power in so far as it undertakes to regulate movements of office cars in intrastate commerce.

The plaintiffs, as stated in their specification of errors, ask leave of the Court to amend their assignment and specification of errors by inserting an additional assignment or specification; or, in the alternative, they ask the Court to notice, as a plain error, the error so sought to be specified, as follows:

> 8. The lower court erred in not holding that the Commission's order, in so far as it purports to affect, control, or regulate strictly intrastate movements of office cars, is invalid because it is in violation of Sec. 1 (2) (a) of the Interstate Commerce Act, and also because it is in excess of the powers conferred on the Federal government by the commerce clause of the Constitution (Art. I, Sec. 8).

While the Commission's lack of power to embrace in its order intrastate commerce, as well as interstate commerce, was called to the attention of the lower court in our

reply brief, it was not specified as a ground of complaint in the petition. It was thought that so much of the Commission's order as purports to regulate intrastate commerce was void, even in the absence of a judicial declaration to that effect; but, in view of the severe penalties imposed by the Act for failure to comply with an order of the Commission and a general desire to avoid an apparent conflict with constituted authorities, we now wish to present this question, if we may properly do so, for the Court's determination.

The right of an appellant to amend its assignment of errors has been sustained in *O'Connell* v. *United States*, 253 U. S. 152; *Flickinger* v. *First National Bank*, 145 Fed. 162 (certiorari denied, 203 U. S. 595). Furthermore, the Court's power to notice a plain error is recognized in its rules (Rule 27, paragraph 4).

In Sec. 1 (2) of the Interstate Commerce Act, it is provided:

> The provisions of this Act . . . shall not apply—
>
> (a) To the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one State and not shipped to or from a foreign country from or to any place in the United States as aforesaid.

The absolute want of power in Congress, and therefore in the Commission, to regulate the movements of office cars in intrastate commerce is apparent. This Court's ruling in *Howard* v. *Illinois Central R. Co.*, 207 U. S. 463, conclusively establishes, we respectfully submit, the invalidity of the Commission's order, in so far as it purports to extend to intrastate commerce.

V.

Both the Commission and Congress are deemed to have recognized the legality of the movement of office cars over foreign lines under free passes covering the transportation of the car, as well as the officers and employees occupying it.

Plaintiffs' contention may be briefly summarized as follows:

The practice of hauling the office cars of other lines without charge prevailed at the time of the passage of the Act to Regulate Commerce (R. 116). In the Hepburn Act of June 29, 1906, Congress made detailed provision for the issue of interstate passes. In 1907, the Commission issued certain regulations governing the forms of passes. The form for "car and party" passes is given, as follows (R. 32):

> Pass John Smith, car, and five officers and employees, Account President, officers, and employees X. Y. Z. Ry.

Thereafter, for 22 years, movements of office cars over foreign lines were made under car and party passes issued in accordance therewith. During this period, Congress, with full knowledge of the uniform and general practice of moving office cars over foreign lines under car and party passes, repeatedly amended the Interstate Commerce Act, and substantially reenacted a considerable portion of it. But in none of this legislation did Congress undertake to restrict or prohibit free movements of office cars over foreign lines or the issuance of car and party passes to cover such movements.

Plaintiffs contend that the action and non-action of Congress is equivalent to an adoption by it of the Commission's regulation above referred to, and that thereby the movement of office cars over foreign lines under car and party passes became sanctioned and legalized. This question, however, is presented in the companion case of *Louisville & Nashville R. Co. et al.* v. *United States*, and will not be argued here, since that would be an unnecessary duplication.

Respectfully submitted,

FRANK H. MOORE,
CYRUS CRANE,
Solicitors for Appellants.

SAMUEL W. MOORE,
Of Counsel.

December 22, 1930.

Exhibit "A".

ORDER

At a General Session of The Interstate Commerce Commission, Held at Its Office, in Washington, D. C., on the 4th Day of November, A. D. 1929

No. 17757

In the Matter of Use of Private Passenger Train Cars

It appearing, That, in compliance with the statute in such case made and provided, this commission, upon its own motion, entered into an investigation into and concerning certain questions arising under Sections 2, 3, 6 and 22 of the Interstate Commerce Act as to the transportation or movement of private passenger cars, including so-called office cars, of one carrier subject to the Act by another such carrier free or at other than published tariff rates, and relating to the enforcement of the foregoing provisions of the Act in that regard; and

It further appearing, That a full investigation of the matters and things involved was had, in the course of and pursuant to which a proposed report was submitted to the Commission, whereupon the carriers named in the list hereto attached appeared and by counsel excepted to said report, on which exceptions argument, oral and in writing, was had; and

It further appearing, That on the 21st day of June, 1929, this Commission after full consideration overruled said exceptions and made and filed a report containing its conclusions thereon, which report is hereby referred to and made a part hereof, and therein decided:

1. That the transportation or movement of private passenger cars, including so-called office cars, of one carrier subject to the Interstate Commerce Act by another such carrier free or at other than published tariff rates is contrary to the provisions of the Interstate Commerce Act;

2. That it is unjustly discriminatory and unduly preferential and prejudicial to haul such private cars of other carriers free, or at less than published tariff rates, while charging certain minimum fares and revenues for the movement of privately owned or chartered cars; and

3. That the transportation of persons in such private passenger cars, including berth and other accommodations, at the rate charged passengers provided only with ordinary coach accommodations is unjustly discriminatory and unduly preferential and prejudicial.

In its report the Commission declared that no order appeared to be necessary. On further and subsequent consideration, however, the Commission is of opinion that an order in the premises is proper and appropriate, and, the exceptants to the said proposed report having appeared before the Commission and expressly waived any further hearing in the premises,

It is ordered, That the carriers named in the list hereinbefore referred to and attached hereto, on behalf of which such exceptions were filed and argument heard and on whose behalf a waiver of further hearing has been expressly made, be, and each of them hereby is, notified and required to cease and desist, on or before January 15, 1930, and therefore to abstain, from the transportation or movement of private passenger train cars, including so-called office cars, of another carrier free or at other than published tariff rates.

And it is further ordered, That this order shall continue in force until the further order of the Commission.

By the Commission.

GEORGE B. MCGINTY,
Secretary.

Exhibit "B".

INTERSTATE COMMERCE COMMISSION, WASHINGTON.
In the Matter of Regulations to Govern the Forms and Recording of Passes, Issue of 1917.

At a Session of the Interstate Commerce Commission, Division 4, Held at Its Office, in Washington, D. C., on the 30th day of July, A. D. 1929.

The matter of issuing passes for private passenger train cars being under consideration;

It is ordered: That the Regulations to Govern the Forms and Recording of Passes, Issue of 1917, prescribed under an order of the Commission, entered on July 8, 1916, be and the same are, hereby amended by adding between lines 11 and 12 in paragraph 15 the following:

A car pass may be issued only for cars owned by the issuing carrier or held by it under lease for use in its business as a common carrier. It may not be issued for other cars. This provision is not to be construed as prohibiting the issuance of passes for cars of lines operated as a part of the same system. See In the Matter of the Use of Private Passenger Train Cars, 155 I. C. C. 775.

It is further ordered: That this order shall become effective on August 1, 1929.

By the Commission, Division 4.

GEORGE B. McGINTY,
Secretary.

EXHIBIT "C"

STANDARD FORM FOR DETOUR AGREEMENT

Adopted by The American Railway Association, October 25, 1905; with amendments adopted November 10, 1910, May 17, 1911, November 19, 1913, November 17, 1920, and May 15, 1924.

NOTE—This agreement should be executed on behalf of each company party thereto by an executive officer thereof and duly attested.

This Agreement, Executed in duplicate between.....

....., a corporation created and existing under the laws of.....

and .....

a corporation created and existing under the laws of

.....

WITNESSETH, THAT,

WHEREAS, should the railways of either party hereto become impassable by reason of unforseen occurrences, making detour movement desirable, each party hereto is willing whenever, in its judgment, the conditions warrant, and subject to the terms and conditions hereinafter set forth, to temporarily permit the trains of the other party, hereinafter referred to as the Foreign Company, to be run over its tracks (Home Company) as a service of accommodation and reciprocation.

NOW, THEREFORE, it is mutually agreed by and between the parties hereto as follows:

1. Whenever the Foreign Company desires to detour its trains it shall notify the Home Company, the circumstances necessitating detour movement, between what points, the number and character of trains and such other information as may be required by the Home Company. Upon receipt of such notice the Home Company shall promptly grant or refuse the accommodation requested. The granting of the accommodation will not warrant nor imply the insurance of the Foreign Company's trains against any of the risks of transportation, nor the assumption of liability therefor, by the Home Company. In the event of refusal to grant such permission, the Foreign Company shall have no claim of any nature against the Home Company by reason of such refusal.

2. The Foreign Company, if granted such permission, shall run its trains between the points designated over the tracks of the Home Company, using, unless otherwise agreed between the parties, its own engines, engine crews and train crews fully conversant with the Standard Code of the American Railway Association, but always with a pilot or pilots (not more than one pilot for each Foreign engine or train crew, nor more than two for any one train), to be furnished by the Home Company, and subject to all the rules and regulations of the Home Company, and the orders of its train dispatcher.

In case, by mutual agreement, the Home Company shall furnish engines and engine crews to haul, help or push trains of the Foreign Company, or in case, without mutual agreement, it becomes necessary, by reason of failure of the Foreign Company's engine to handle its train at speed required by the Home Company, or for other cause, for the Home Company to furnish engines and engine crews to haul, help or push trains of the Foreign Company, it may do so, and except at its option, without releasing pilot or pilots previously assigned to the train.

3. The Foreign Company, if granted such permission, shall promptly, upon presentation of bill, pay to the Home Company for trackage, the sum of One Dollar and Fifty Cents ($1.50) per train mile, or fraction thereof, with minimum trackage charge of Ten Dollars ($10.00) for each train detoured (no mileage to be included that is made under Items c, d and e, for which services specific charges are provided), and additional charges for all other services rendered by the Home Company at the rates specified below:

	When engine and engine crew are furnished	
	By Foreign Company Sec. 2, Par. 1	By Home Company Sec. 2, Par. 2

	By Foreign Company Sec. 2, Par. 1	By Home Company Sec. 2, Par. 2
(a) Per engine mile, including light mileage to and from point of service	None	$3.00
(b) Per engine tank for water furnished	$1.00	None
(c) Per engine turned on turntable or wye	$1.00	None
(d) Per car turned on turntable	$1.00	$1.00
(e) Per train turned on wye	$3.00	$3.00
(f) Fuel	Cost including any freight charges assessed by Foreign roads and charges over Home Road calculated at tariff rates to point of delivery plus 10% of total.	None
(g) Other engine supplies	Cost plus 10%	None
(h) Other train supplies	Cost plus 10%	Cost plus 10%
(i) Enginehouse expenses	Cost plus 10%	None
(j) Engine repairs	Cost plus 10%	None
(k) Pilots, including deadhead or light mileage to and from point of service, and furnished in accordance with Section 2, paragraphs 1 and 2	Cost plus 10%	Cost plus 10%
(l) Crews furnished to relieve Foreign train or engine crews, including deadhead or light mileage to and from point of service	Cost plus 10%	Cost plus 10%
(m) Bridge, ferry, terminal, trackage or switching charges assessed by other carriers in connection with handling detoured trains.	Contract or tariff rates	Contract or tariff rates

4. The Home Company shall not be held liable for or on account of any loss, damage, or delay, to the trains, engines, cars or other property of any kind of either company, nor to freight, baggage or other property of any kind carried in or upon such trains, engines or cars, nor for or on account of any injury to or death of passengers or employes of either company, or for or on account of any injury to the person or property of any other individual or individuals, company or companies, corporation or cor-

porations whatsoever, which may be incurred or sustained by reason of such trains being detoured, or by reason of such trains being delayed in such detouring, in whatever manner the same may be caused or occasioned, whether by or through the negligence of the Home Company, its agents or servants, or by reason of defects in tracks, structures, or facilities furnished by the Home Company, or otherwise, it being understood and agreed that all risks of such delays, loss, damage, injury and death shall be and is hereby assumed by the Foreign Company, and the Foreign Company shall and will hold harmless the Home Company from and against all liabilities or claims for all such delay, loss, damage, injury and death, and shall and will execute and deliver, or cause to be executed and delivered, to the Home Company, upon request, a full and complete release, satisfaction and discharge of all claims therefor, and will pay, or cause to be paid, all costs, and expenses incurred by either Company in the clearing of wrecks and repairs to equipment, track and property in which by reason of detour movements covered by this agreement the engines, trains or cars of the Foreign Company are concerned, expenses and attorney's fees incurred in defending any action which may be brought against the Home Company on account of any such claim or liability and any judgment which may be rendered against the Home Company on account thereof. The Foreign Company shall pay all fines, penalties, costs and expenses imposed upon or incurred by the Home Company by reason of any violation by the Foreign Company of the Safety Appliance or other State or Federal Laws, and hold the Home Company harmless therefrom.

5. In no case shall the Foreign Company do any local freight or passenger business whatever on the tracks of the Home Company without its consent.

All mileage and per diem accruing on cars in detoured trains shall be assumed by the Foreign Company and reported and paid by it direct to owners of cars.

6. (Special provisions.)

7. All differences soever which shall, consequent upon the detouring of trains, arise under this agreement, or otherwise, between the parties shall be submitted to the Committee on Operating Rules, Division I—Operating, as then constituted, of the American Railway Association on thirty (30) days' written notice to the other party. All proceedings before such Committee shall be had in accordance with such rules as it shall, from time to time, promulgate and the decision of such Committee shall be final and binding on and accepted as such and performed by all the parties.

8. All existing understandings and agreements between the parties hereto, or their predecessors, relating to matters included herein, are hereby abrogated and made void except that neither of the parties hereto shall be released from any liability which may have arisen under agreements and understandings in effect prior to the date of the execution of this agreement.

9. The covenants of this agreement shall be binding upon and inure in favor of the successors and assigns of the parties hereto, respectively, and the same shall be and remain in force from the date hereof until terminated by either party giving to the other ninety (90) days' notice in writing, fixing the date of such termination, and upon the date stated in such notice this agreement shall cease and determine.

In Witness Whereof, the parties hereto have executed this agreement in duplicate this.....

day of....., 19.....

.....

By.....

Its.....

.....

By.....

Its.....

STANDARD FORM FOR DETOUR AGREEMENT

BETWEEN

.....

AND

.....

DATED ..... 19.....

FILE COPY

JAN 13 1931

CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 517.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY and TEXARKANA AND FORT SMITH RAILWAY COMPANY,

Appellants,

v.

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Appellees.

APPEAL FROM UNITED STATES DISTRICT COURT FOR THE WESTERN DIVISION OF THE WESTERN DISTRICT OF MISSOURI.

REPLY BRIEF OF APPELLANTS.

FRANK H. MOORE,
CYRUS CRANE,
Solicitors for Appellants.

SAMUEL W. MOORE,
Of Counsel.

January 12, 1931.

Pandick Press, Inc., 22 Thames St., New York, U. S. A.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY and TEXARKANA AND FORT SMITH RAILWAY COMPANY, Appellants, *vs.* THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Appellees.	No. 517.

REPLY BRIEF OF APPELLANTS.

I.

Defendants decline to support the lower court's conclusion that office cars are moved over foreign lines under published tariffs.

One significant feature of the brief filed by defendants is that they apparently have abandoned any effort to support the lower court's conclusion upon what we regard as the crux of the case. The basis of the lower court's decision, as we understand it, was its assumption that movements of office cars are covered by published tariffs, and that, therefore, office cars are moved by the transporting carrier in the performance of its common carrier duties. We refer to that part of the lower court's opinion reading as follows (R. 142):

> It is not necessary to consider what might be the law if railroad companies did not hold themselves

> out as common carriers of private cars. They do. They have established tariffs for the transportation of such cars. That is a part of their common carrier business.

But the defendants in their brief do not now contend that the movement of office cars is covered by any published tariff. On the contrary they concede that no published tariff exists or ever has existed. Counsel say (p. 36): "the decision of the lower court does not appear to be that carrier-owned private or office cars are covered by the tariffs." Their contention now is thus stated (p. 24): "The transportation free and without published tariff charge by one carrier * * * of the office car of another such carrier is not private transportation," etc. They assert (p. 29): "The violations of Section 6, of which appellants are guilty, are that they transported property without tariff charges on file for its transportation, and extended to persons privileges or facilities not named in their tariffs."

Not only, therefore, is there an absence of any effort on the part of defendants to support the lower court's conclusion that railroad companies hold themselves out as common carriers of office cars, but it now appears to be conceded that published tariffs do not now, and never have covered movements of such cars. By this concession, the main issue is narrowed to a comparatively small compass, which may be thus stated: Assuming that there is not now, and never has been, a tariff covering the movements of office cars, and that such movements in the past have always been made gratuitously on special request in each individual instance, as a matter of reciprocal accommodation, have such movements been made by the transporting carriers in their private carrier or common carrier capacity?

We gave our reasons in our original brief for our contention that the movement in the case assumed is strictly a private carrier movement. We now proceed, after answering a preliminary contention urged by defendants against the jurisdiction of the lower court, briefly to answer the arguments advanced by defendants in their brief, and to point out the inapplicability of the court decisions upon which they appear to rely.

II.

There is no merit in defendants' contention that the lower court was without jurisdiction of this action.

Defendants are not contending that the Kentucky suit is *res adjudicata* in the present action; nor are they complaining of the matter of venue; nor of the action of the lower court in refusing their application that the present action be stayed until a decision of the Kentucky suit.

Their sole insistence is that the lower court was without jurisdiction, that is, without power or authority to entertain the action and to render a decision therein. They contend that when the Kentucky suit was brought, that court thereby appropriated to itself exclusive jurisdiction of all causes of action that might be asserted by any of the many carriers of the country to set aside the order in question; and that after the filing of such action, all other carriers of the country must take their witnesses and lawyers to Kentucky, and present and litigate their causes of action in the Kentucky court, not as petitioners asserting their own claims as the law provides, but as interveners in that action; and this contention is made, notwithstanding the Urgent Deficiencies Act which in terms specifically

vests jurisdiction of an action of this nature in each and every district court in the United States, and notwithstanding its venue provisions permitting each carrier, in cases like the present one, to conduct its litigation at its own domicile.

Before considering the questions of law involved in defendant's challenge of the jurisdiction of the lower court, it is important to have in mind the nature of the Kentucky suit, as well as the nature of the present action; their points of difference in respect to the causes of action asserted, the parties asserting them, the evidence adduced in support thereof at the hearings in the courts below, and the extent of the relief prayed for.

The differences between the two actions are real and substantial.

In the Kentucky case, three grounds were asserted for challenging the Commission's order, which are thus stated by the Kentucky court:

> (a) . . . the plaintiffs argue that when a common carrier exercises its legal right to issue a pass to an officer or employee of another common carrier, or to members of their families, in exchange for a like courtesy, it has the right to transport such pass holder in whatever appropriate vehicle it may see fit to use; that it may haul such pass holder in one of its own cars, in a leased car, or in a car owned by the carrier of which the pass holder is an officer or employee, and lent to the moving carrier for the purpose of transporting the pass holder; that from whatever source the car may be obtained, it is a transportation facility of the moving carrier, and not an article of commerce for movement of which it must charge the owning carrier the published tariff rate.

(b) The plaintiffs further contend that the provisions of the Interstate Commerce Act, requiring the filing and publication of tariff schedules, and adherence thereto, and the provisions of Sections 2 and 3 of the Act, against unjust discrimination and undue or unreasonable preference, have no application to persons or property which the law permits to be moved free or at reduced rates.

(c) It is further argued that the alleged long-continued sanction by the Interstate Commerce Commission of the practice condemned in the order complained of constitutes a binding interpretation of the act as permitting the practice now condemned, and that Congress, in re-enacting the Act's provisions with reference to passes and reduced rates, has impliedly adopted such interpretation.

It will be noted that the first two grounds above mentioned constitute no part of the case made by the plaintiffs herein.

In the present case the grounds for the relief sought (in addition to (c), above stated, the argument of which is left to petitioners in the Kentucky case) are: (1) that the plaintiffs and other carriers have never held themselves out, by published tariffs or otherwise, as common carriers of office cars, and that the transporting carrier, in moving an office car, acts in the capacity of a private carrier, and, hence, the terms of the movements are properly governed by contract between the interested carriers who cannot be compelled to surrender their right of contract and to accept tariff schedules in lieu thereof; (2) that there was no evidence before the Commission sufficient to justify a finding by it that an office car movement of this nature was unduly preferential or unjustly discriminatory.

These two grounds for relief constitute no part of the case made by petitioners in the Kentucky suit.

Manifestly, the causes of action in the two cases are substantially different. The facts essential to the maintenance of one action would not support the other. "The true test of the identity of causes of action," says the court of appeals for the eighth circuit (*Union Central Life Ins. Co.* v. *Drake*, 214 Fed. 536), "is the identity of the facts essential to their maintenance." See, also, by the same court, *Harrison* v. *Remington*, 140 Fed. 385; *Munn* v. *Des Moines Nat. Bank*, 18 F. (2d) 269; *Pierce* v. *National Bank of Commerce*, 268 Fed. 487.

The only evidence introduced in the Kentucky suit in support of its petition was the record before the Commission. In the present action, in addition to the record before the Commission, oral testimony was introduced showing that plaintiffs and the other carriers of the country had never held themselves out by published tariffs or otherwise as common carriers of office cars; that such cars were moved over foreign lines only on special request in each instance, which request the foreign line was at liberty to grant or refuse in its discretion; and giving in detail the practice in respect to the movement of such office cars, the necessity therefor in railway operation, the advantages of the use of such cars, and covering the subject of office cars generally.

Furthermore, the relief sought in the Kentucky case is broader than the relief sought here. There it was based upon the asserted right of one carrier to transport free the private car or office car of another carrier, provided only that the car was occupied by pass holders—of whom there are more than 40 classes enumerated in paragraph (7) of Section 1—regardless of their relation to the owning car-

rier, and wholly irrespective of the purpose of their journey, or the nature of their employment during the journey.

The difference in the parties, in the causes of action, in the evidence, as well as in the relief sought, in the two cases is real and substantial.

It is said in defendants' brief (p. 14) that the petitioners in the Kentucky case sue "on behalf of themselves and all other carriers which might have an interest in the premises," etc. While the petition contains language of that nature, it is clear that the plaintiffs in the present case were not parties to the Kentucky suit, nor represented in it in any way whatsoever. The Commission in its answer in the Kentucky case specifically demanded strict proof that the petitioners therein were suing for or represented any other carriers. No evidence was offered upon this subject at the hearing. There is no finding by the court that any such representation existed. See *Hill* v. *Eagle Mfg. Co.*, 219 Fed. 719. Furthermore, a conclusive answer to any suggestion of representation consists of the fact that the plaintiffs herein, in February, 1930, while the Kentucky case was pending undetermined, brought the present suit, which was notice that they did not desire to be represented in or concluded by the decision rendered in the Kentucky case.

Plaintiffs were entitled to invoke the jurisdiction of the lower court, and were not required to assert their rights through intervention in the Kentucky suit.

The starting point of defendants' argument is not the Hepburn Act of 1906, which for the first time vested a statutory jurisdiction in the circuit courts to set aside or enjoin an order of the Commission, but the Commerce Court Act of 1910, by the terms of which such then existing

jurisdiction was concentrated in that court. They argue that when the jurisdiction of the commerce court was later re-distributed to the district courts, each of the district courts stepped into the shoes of the commerce court, with the latter's procedure for intervention by interested parties, and that, in some way not easily understood, the first suit brought in any such district court, *ipso facto*, ousted the jurisdiction of all other district courts in the United States to entertain suits relating to the same order, by whomsoever brought and on whatsoever causes of action. Thereafter all persons desiring to challenge the order in question must do so by intervention in the first suit. If, for illustration, two carriers—one in the state of Washington and the other in Florida—desire to contest an order of the Commission affecting both of them adversely, the Florida carrier, by bringing its suit first in the district court of that state, thereby deprives the district courts in Washington and in all other states of their jurisdiction, and forces the Washington carrier, as well as all other interested carriers, with different and, it may be, conflicting causes of action, to cross the continent with their witnesses and lawyers and assert their rights as interveners in the Florida suit; and *vice versa*. We contend that this view of the law finds no support whatsoever in the applicable statutes, and we proceed to state our reasons.

Instead of beginning with the Commerce Court Act, as defendants have done, we feel that it may be helpful to present a brief review of the history of the jurisdictional provisions relative to suits brought to set aside and annul orders of the Commission.

From the very beginning, the Commission was empowered to sue and to be sued in the federal courts. Where the necessary grounds of equitable relief were present, no

specific statutory provision was necessary to authorize a federal court, under its general equity jurisdiction, to entertain a suit against the Commission. That Commission was "a body corporate with legal capacity to be a party plaintiff or defendant in the federal courts" and its acts could be restrained if beyond the power which it could constitutionally exercise, or beyond its statutory power, or based upon a mistake of law, or if without evidence to support them (*Texas & Pacific R. Co.* v. *Interstate Commerce Com.*, 162 U. S. 197, 204; *Louisville & Nashville R. Co.* v. *Garrett*, 231 U. S. 298).

In the Hepburn Act of June 29, 1906, the rate-making power for the first time was conferred upon the Commission, by amendment of Section 15; and for the first time a penalty was prescribed for disobedience of the orders of the Commission, by amendment of Section 16. In view of these amendments it was realized by Congress that, in fairness to carriers, some provision should be made for a court review of the Commission's orders, and accordingly by that act the circuit courts were vested with statutory jurisdiction to hear and determine all actions to enjoin, set aside, annul or suspend any order of the Commission, with appropriate provision for the venue of such actions, as follows:

> The venue of suits brought in any of the circuit courts of the United States against the Commission to enjoin, set aside, annul, or suspend any order or requirement of the Commission shall be in the district where the carrier against whom such order or requirement may have been made has its principal operating office, and may be brought at any time after such order is promulgated. And if the order or requirement has been made against two or more carriers then in the district where any one of said carriers has its principal

> operating office, and if the carrier has its principal operating office in the District of Columbia then the venue shall be in the district where said carrier has its principal office; *and jurisdiction to hear and determine such suits is hereby vested in such courts.*

It is thus apparent that as early as 1906 each and every circuit court of the United States was vested with full and complete jurisdiction to hear and determine each and every action brought to enjoin, set aside, annul or suspend any order of the Commission. There is, in this legislation, no intimation that but one action is authorized in cases where separate causes of action are created in favor of several defendants in the proceedings before the Commission.

The venue provisions are significant. The suit challenging the Commission's order shall be brought in the district where the carrier has its principal operating office, or in the district where one of the carriers, if more than one are involved, has its principal operating office. The clear intention of Congress was that the litigation should be conducted, not in a remote part of the country where the first suit might be brought, but in a district convenient to the carrier or carriers bringing the action.

If the Act of 1906 had remained in force until the present day, unaffected by subsequent legislation, it is entirely clear that the district court in Kentucky, and the district court in Missouri, would each have possessed complete jurisdiction to hear and determine the two suits, respectively. Doubtless this will be conceded by defendants. It is our contention that the effect of the Urgent Deficiencies Act was to re-transfer to each of the district courts their original statutory jurisdiction first created in 1906 and afterwards concentrated in the commerce court; that the net result now, so far as jurisdiction is concerned, is

precisely the same as if the Act of 1906 had continued in effect without subsequent modification; and that the only change in procedure effected by the subsequent legislation and material here, was in giving an absolute right of intervention to those seeking to intervene, instead of the discretionary right theretofore existing.

In 1910 Congress deemed it advisable to concentrate in one court all actions to enjoin, set aside, annul or suspend an order of the Commission, and hence on June 18 of that year it created the commerce court, and vested it with the jurisdiction which the Act of 1906 had created in the various circuit courts. It was there provided:

> The commerce court . . . shall have the jurisdiction now possessed by circuit courts of the United States and the judges thereof immediately prior to June eighteenth, nineteen hundred and ten, over all cases of the following kinds: . . . Second. Cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission.

The concentration of all jurisdiction in the commerce court not having proved satisfactory, Congress, by the Urgent Deficiencies Act of October 22, 1913, abolished the commerce court and re-transferred its jurisdiction over actions to enjoin, set aside, annul or suspend orders of the Commission to the several district courts of the United States. The provision of the Act in that behalf is as follows:

> The commerce court . . . is abolished from and after December thirty-first, nineteen hundred and thirteen, and the jurisdiction vested in said commerce court by said act is transferred to and vested in the several district courts of the United States,

> and all acts or parts of acts in so far as they relate to the establishment of the commerce court are repealed.

The effect of this last act was to re-distribute to the district courts, and each of them, the plenary jurisdiction over all actions to enjoin, set aside, annul or suspend any order of the Commission, vested in the circuit courts by the Act of 1906, and later concentrated in the commerce court by the Act of 1910. The jurisdiction of the commerce court is "transferred to and vested in the several district courts of the United States." The effect of the act, says the Court in *Vicksburg, Shreveport & Pacific R. Co.* v. *Anderson-Tully Co.*, 256 U. S. 408, was "to redistribute the jurisdiction" of the commerce court.

The prior venue provision was modified to read as set forth in defendants' brief (p. 18), which requires actions challenging an order of the Commission to be brought in the judicial district "wherein is the residence of the party or any of the parties upon whose petition the order was made"; or "where the matter complained of in the petition before the Commission arises"; or "in the district where one of the petitioners in court has either its principal office or its principal operating office." Here, again, it is apparent that it was the intention of Congress that the litigation over orders of the Commission should be in district courts convenient to the parties. There is no intimation that carriers shall be required to conduct their litigation through intervention, at increased expense, in distant courts.

It is clear, therefore, that every district court of the United States is vested with full and complete jurisdiction over every action brought to enjoin, set aside, annul or

suspend an order of the Commission, and that the venue provision permits the litigation to be conducted, not in some remote part of the country, but in a district court convenient to the parties. Each and all of the carriers affected by the Commission's order in this proceeding, including the plaintiffs, were vested by the express terms of the statute with the right to challenge the validity of the order by suit in any district court of the United States, subject only to the venue provisions. Of course, the venue provision might be insisted upon or waived. Both the Commission and the United States, like other litigants, may waive or insist upon their rights under the venue provision at their pleasure (*Peoria R. Co.* v. *United States,* 263 U. S. 528; *United States* v. *Hvoslef,* 237 U. S. 1; *Thames & Mersey Ins. Co.* v. *United States,* 237 U. S. 19; *Commercial Casualty Co.* v. *Stone,* 278 U. S. 177).

Defendants attach an undue and unwarranted importance to that provision of the Commerce Court Act granting intervention as a matter of right, instead of as a matter of discretion. They argue that this is conclusive evidence of an intention on the part of Congress to create a contingent and shifting jurisdiction in the district courts. Their position appears to be that before the bringing of the first suit, each and all of the district courts have plenary jurisdiction; but that upon the filing of the first suit, a startling change takes place: there is an automatic repeal of the statutory grant of jurisdiction to all other district courts, together with a repeal of the venue provisions, enacted for the convenience of suitors; all other carriers must either forego their causes of action or present them, not by petition, as the law provides, but by way of intervention in the first suit.

But there can be no merit in this argument. When jurisdiction was concentrated in the commerce court, it

was appropriate to permit interventions as of right, instead of in the court's discretion, as had been the rule theretofore. Assuming that in the redistribution of jurisdiction to the several district courts of the United States this provision for intervention went along with it, there is no evidence of any intention on the part of Congress to qualify its grant of jurisdiction with any shifting or contingent provisions. To support defendants' argument it is necessary to read into the Act a proviso substantially in the following language:

> Provided, That the first suit brought in any district court shall have the effect of instantly depriving all other district courts of their jurisdiction over actions to contest the order in question; and provided further, that all other parties desiring to contest the order are required, notwithstanding the venue provisions, to assert their claims in such first suit, not by petition, as the act provides, but by way of intervention.

But the law contains no such proviso. If Congress had intended that there should be a proviso of this nature, it may safely be assumed that it would have said so in plain and unmistakable language.

Although every district court in the United States has jurisdiction of every action which might be brought by any railway company affected by the Commission's order in the office car case, it is not to be supposed that actions of this nature would be brought by the wholesale. Both the Commission and the United States may be relied upon to insist that actions be brought in the proper district, and timely objections to an inappropriate venue would be sustained as of course.

Nor is it to be supposed that unnecessary or vexatious suits would be brought. Courts possess an inherent power

to stay actions of that nature. The defendants themselves, in recognition of this inherent power of the lower court, appealed unsuccessfully to it to stay proceedings in the present case until a decision should be rendered in the Kentucky suit. If one suit presents all the contentions of the various carriers, with the expectation that it would be finally determined in this Court, if that course seemed desirable, doubtless all parties in interest would be satisfied, and no other action or actions would be deemed necessary. If several suits are brought in different districts the possibility of conflicting judgments is unimportant, since appeals lie direct to this Court.

It is entirely possible, however, that where many carriers are affected by an order of the Commission they may differ among themselves as to the basis of the action to be brought against the Commission, and the measure of the relief to be asked. The different grounds put forward in good faith by the two groups of carriers for the challenge of the Commission's order may be so inconsistent that they cannot properly be united in one action or asserted by way of intervention. The extent of the relief asked in one action may be broader than the relief which other carriers may feel themselves entitled to receive. Manifestly, if only one suit can be brought, the rights of some, perhaps many, carriers may be sacrificed.

The defendants contend that the plaintiffs should have intervened in the Kentucky suit. Aside from the fact that interventions are in their nature voluntary, and that they may not be forced upon unwilling parties, as held in *Adler* v. *Seaman,* 266 Fed. 828, 837 (C. C. A. 8), the plaintiffs could not, under well settled rules, intervene in the Kentucky case and there assert the rights which they are asserting here. An intervention, under Equity Rule 37, must be "in subordination to, and in recognition of, the pro-

priety of the main proceeding". As stated by the court of appeals for the eighth circuit in *Adler* v. *Seaman, supra,* intervenors "cannot challenge the propriety of the main litigation, but must accept it".

As before pointed out, the two actions, while having one point in common, are otherwise based upon different causes of action. The main basis of the Kentucky suit, for illustration, is the allegation, in paragraph 7, that a private car, when accepted by another carrier, "becomes *pro hac vice* and for the purposes of such movement the property of the carrier making the movement and rendering the service". The petition in the present cases takes the opposite view, alleging, in paragraph 10, that "such office cars do not become or constitute any part of the common carrier equipment of such foreign lines, and are not available for the general use of passengers traveling on such foreign lines". The allegations and the prayer for relief in the Kentucky case are, to some extent, inconsistent with the allegations and the prayer in the present case. For these reasons the plaintiffs in this case could not assert, by way of an intervention in the Kentucky suit, the rights which they claim herein.

Apparently, it makes not the slightest difference, in the view of the defendants' counsel, whether the first action is based upon a good or bad cause of action; nor whether it properly represents the claims and contentions of the other carriers affected by the order. If the first suit, for illustration, should be based solely upon the claim that the Interstate Commerce Act is unconstitutional, this claim, however ridiculous it might be at this date, and however much it might be disapproved by other carriers who conceived that they had meritorious grounds for successfully contesting the order, would nevertheless effect an exclusive appropriation of all actions to set aside the Commission's

order, subject only to the right of intervention, and oust all district courts of the United States of their jurisdiction to entertain any such action.

III.

Defendants are in error in their contention that the movement of an office car of another carrier is a violation of the act unless the movement is covered by a tariff published under the provisions of Section 6.

The lower court's conclusion, which was clearly the main ground of its decision, that published tariff provisions, in force at the time of the Commission's investigation, covered the movement of office cars, has not found favor with the defendants. They now take the opposite view, and insist that there were no tariff provisions covering such movements. And, this being conceded, it necessarily follows that there never have been any tariffs of that character.

Defendants now contend that the movement of an office car over a foreign line is a violation of Section 6 of the Act because there are no published tariffs covering such movement. The issue is thus practically narrowed to this one question. They say that the carriers of the country have been guilty of violations of Section 6 because "they transport property without tariff charges on file for its transportation, and extend to persons privileges or facilities not named in their tariffs."

Defendants' argument runs somewhat as follows: Section 6 (1) requires carriers to file and keep open to public inspection all rates and charges between points on their own lines and between points on their lines and the lines of

other carriers; Section 6 (7) prohibits the transportation "of passengers or property, as defined in this Act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act"; the carriers of the country have failed to file tariffs covering the movement of office cars, and they have transported such office cars without such tariffs being on file; such office cars are "property", and hence tariffs should have been filed covering their movement; and the transportation of such office cars without covering tariffs is in violation of Section 6. But the argument, we respectfully submit, is wholly without merit since it merely begs the question in assuming that the movement of an office car is a common carrier movement, as distinguished from a private carrier movement, which is the real question for decision in the case.

As we have endeavored to point out in our original brief, the movement of the office car of another carrier in the circumstances disclosed in this record is a private carrier movement. This, as there stated, is true for two reasons.

In the first place, movements of office cars over foreign lines have always been without charge. The carriers performing the movement were carriers without hire. It is the universal rule that carriers without hire are not performing a common carrier service, but, on the contrary, they are private carriers or bailees without hire. The authorities and text writers supporting this proposition are cited in our original brief (p. 48). We are not advised of any decision to the contrary, and we deem further comment unnecessary.

In the second place, there being no tariffs covering movements of office cars, it necessarily follows that the

carriers have never held themselves out to the public as common carriers of office cars. There is no legally enforceable obligation upon carriers to accept and move office cars. When they are accepted and transported, it is only on special request in each individual instance, as a matter of reciprocal accommodation. These facts appearing in the record without contradiction conclusively establish that the movement of an office car is a private carrier movement. We need only to refer to the authorities cited in our original brief as full authority for this contention.

The transportation of an office car over a foreign line being a private carrier movement, as distinguished from a common carrier movement, as we believe has been abundantly demonstrated, the provisions of Section 6 relative to the publication of tariffs have no application whatsoever. The authorities and text writers cited in our original brief (p. 20) establish this contention.

The precise question was passed upon by this Court in *Terminal Taxicab Co.* v. *Kutz,* 241 U. S. 252. After reaching the conclusion that that part of the Taxicab Company's business which involved the hiring of automobiles from its central garage was a private carrier business, because "the bargains are individual", and hence there was no undertaking in favor of the general public, this Court held that there was no obligation on the part of the Taxicab Company to file its schedule of rates with the Public Utilities Commission, saying (p. 256):

> It follows that the plaintiff is not bound to give information as to its garage rates.

This Court, in *Santa Fe R. Co.* v. *Grant Bros. Co.,* 228 U. S. 177, 188, held that a railway company is a private carrier with respect to the transportation of cars contain-

ing the outfit of a construction company, and that a transportation charge less than tariff rates for similar transportation was "not obnoxious to the provisions of the law prohibiting departures from published tariffs, for the reason that such an agreement lies outside the policy of these provisions."

In *Segar* v. *Northern Pacific R. Co.*, 166 Fed. 526, it is held that state statutes prohibiting undue and unreasonable preferences to persons or localities with respect to any particular description of traffic have no application to transportation services performed by a carrier in its capacity as private carrier. It is said that these sections of the statute should be construed "as referring simply to such transportation service as the railroads of that state were or are required to perform for the general public in the discharge of their duties to the public as common carriers"; and that they "should not be held to embrace services which the common carriers of that state, as well as other states of the Union, have never been obligated to perform, but which they have rendered to the public from time to time under special contracts similar to the one here in question."

In *ex parte Alabama Great Southern R. Co.*, 206 Ala. 400, it is held:

> Code 1907, sec. 5522, requiring the schedules of a common carrier filed with the Railroad Commission to contain all charges for track and car service or rental, and for switching, demurrage, terminal, and transfer service, and for rendering any other service in connection with the transportation of passengers and property, refers to such rental and service as are to be performed in its capacity as a common carrier, and does

not extend to a charge made to a showman for parking his cars on the carrier's tracks for a period of 45 days, and it is entitled to make such charge, though not contained in its schedule.

In 10 C. J., sec. 759, it is said:

> Statutory provisions against unjust discrimination in rates have no application to services performed by the carrier which are outside of the scope of its duties as such. It has been so held in respect of a contract between a railroad company and a construction company for a reduced rate of transportation of men and materials required by the company in grading an extension and entered into in good faith, and of a contract for the transportation of a circus train providing that the carrier should furnish motive power, etc., and, in consideration of a reduced rate, should not be liable for injuries caused by its negligence in performing the contract. Contracts of this character lie outside the purpose of the statutes, and should not be held to embrace services which common carriers have never been obligated to perform, but which they have rendered to the public from time to time under special contracts. Since a railroad company is not bound as a common carrier to furnish facilities for loading freight at points between stations, it may grant that privilege to one person to the exclusion of all others. Thus the fact that a railroad company had for a long time allowed private individuals to engage in the business of loading logs at points between stations, and that plaintiff had built up a profitable business under that arrangement, does not give plaintiff any right to insist that it be continued, and he cannot object that the railroad company thereafter gave another the exclusive license to load logs between stations.

That published tariffs for private carrier service are unnecessary is asserted in *Roberts on Federal Liabilities of Carriers* (1929), 2d Ed., Vol. 1, at Sec. 310, where it is said:

> The provisions of the statute prohibiting departures from published tariffs are not binding upon a railroad company when it is acting outside the performance of its duties as a common carrier.

Upon both reason and authority private carrier activities and services are not required to be covered by published tariffs under Section 6. Published tariffs are for the guidance and protection of shippers and travelers who have the legal right to demand the services specified in the tariffs, upon the payment of the published rates. Private carrier service is not open to the public generally. No tariffs are necessary or appropriate. Shippers and travelers have no legal right to demand a private carrier service, because the railway company does not hold itself out as ready to perform the service for all alike who may apply.

Defendants' contention that the transportation of anything whatsoever coming within the definition of tangible "property" must be covered by published tariffs cannot be sustained. The Act providing for published tariffs was designed to regulate the transportation of persons and property which the carriers of the country hold themselves out to the public as ready to transport in their capacity as common carriers. Transportation services rendered in the capacity of a private carrier or bailee for hire, or bailee without hire, are outside the regulatory acts. Tariff provisions do not apply to them.

Numerous instances might be given of transportation services performed by carriers which are outside of their duties as common carriers. In those cases "property" is transported; but no one will contend for a moment that

such transportation without covering tariffs is a violation of Section 6. Some of these instances will now be referred to.

The carriers of the country are daily transporting a vast amount of express matter under contract with the express companies. This express matter is property. No tariffs are filed by the railway companies to cover the movement, because the transportation by the railways is not in their capacity of common carriers, but as private carriers, under contract (*Express Cases,* 117 U. S. 1.) Certainly, the railway companies in so doing are not violating the provisions of Section 6.

While locomotives and freight and passenger equipment coming from a manufacturer to the home line for use in transportation service are covered by tariffs, as the Commission points out in its report, the subsequent movements of such locomotives and equipment, in service or dead-head, over both home and foreign lines are not now, and never have been, covered by published tariffs. Of course, such locomotives and equipment constitute property of great value. If the movement of property requires a covering tariff, as defendants contend, then every such movement should be covered by tariffs, and all the carriers of the country are in daily violation of Section 6 by reason of their failure in that respect.

It is well known that freight cars pass over many lines in through movements under load, and likewise in returning empty; that privately owned freight equipment is in daily use over various railroads throughout the country; that passenger equipment in joint service is in constant use over the lines of two or more carriers, both when in service and when moving dead-head. There are no tariffs covering these movements. If, as defendants contend, all transporta-

tion of property must be covered by tariffs under Section 6, then the violations of that section are so vast in number as to almost reach astronomical figures.

The Commission itself in its report in this case fully recognizes that property represented by an office car, in some instances at least, may be transported without a covering tariff, since it impliedly authorizes a carrier to transport its own office cars over its own lines without complying with Section 6. True, it concludes that property represented by an office car when moving over a foreign line is property and must be covered by a tariff, and must move at tariff rates. The logical result of these two apparently conflicting conclusions is that an office car is property when moving over a foreign line, but not property when moving over the home line; that an office car becomes property at the junction point, when it leaves the home line and passes on to the foreign line; and that what is innocent up to the junction joint becomes a violation of law when that point has been passed. It is difficult to reconcile the Commission's conclusions. It seems fairly clear that if an office car is property on a foreign line, it is equally property on the home line. If its movement should be covered by tariff in one case, it would seem that a tariff is equally imperative in the other.

It is difficult, also, to reconcile the defendants' position in this case with the Commission's Conference Ruling with respect to astray shipments, pointed out in our original brief (p. 58). Such astray shipments naturally are property; but the Commission itself ruled that they may be moved to their proper destination without the assessment of additional charges and without the necessity of publishing, posting or filing any tariff to cover the movement.

The same may be said of the standard form of detour agreement (Exhibit C), by which the equipment of a carrier is moved over a foreign line in case of emergency, either with the power and crew of the home line, or with the power and crew of the foreign line. Such trains undoubtedly constitute "property"; but no one for a moment will contend that such detour movements should be covered by published tariffs.

Again, substantially all the carriers of the country transport United States mail, which is property; but no one would think of requiring a tariff for the movement of mail, since the carriers in transporting it act as private carriers.

Defendants' contention that any movement by a railway company of "property" must be covered by published tariffs under Section 6 is altogether too broad and sweeping to be accepted as a universal rule. No doubt, where a carrier holds itself out as a common carrier of specific property, tariffs must be filed covering the movement, advising the public of the rates, fares and charges, and all the conditions that affect either charges or service; but the very reason for the publication of tariffs covering common carrier service excludes the publication of tariffs for a private carrier service. The public is not interested in a private carrier service. Carriers do not offer to perform them for the public generally. They are under no legal obligation so to do. It is futile, therefore, for defendants to claim that a carrier moving an office car in its capacity as a private carrier is under legal obligations to file a tariff under Section 6 covering the movement.

IV.

The authorities relied upon by defendants are inapplicable because they deal with common carrier services performed under published tariffs.

Defendants contend that the ownership of property transported by a common carrier is no criterion by which to determine whether the service is that of a common carrier or private carrier, and they cite in support of their position *Interstate Commerce Commission* v. *Baltimore & Ohio R. Co.*, 225 U. S. 326.

We are unable to see that the case has the slightest bearing upon the issue before the Court. There the carriers had put into effect two published rates on coal; one rate covering "coal, on the one hand, consigned to a railroad company and coal, on the other hand, consigned to some other party". The two classes are called, respectively, "railroad-fuel coal" and "commercial coal". The rate on railroad-fuel coal was substantially less than the rate on commercial coal. The Commission held that this disparity in rates constituted a discrimination; and this ruling was upheld by this Court.

The distinction between that case and the one at bar is most obvious. There the railway companies held themselves out as common carriers of both classes of coal; their published tariffs covered both classes. They thereby assumed the legal obligation to carry both classes for all alike who should apply. Their obligation to transport either class at the instance of any shipper was a legal duty, and enforceable by court action. They were common carriers of both classes of coal, and, as such, the Commission had the right to say that the service and the conditions attend-

ing the transportation of the two classes of coal were so similar as to forbid a difference in tariff rates between the two. It is quite apparent, therefore, that neither the Commission nor the Court had before it any questions involving the performance by a carrier of any of its private carrier activities, nor the rules or principles applicable thereto.

They also cite *American Express Co.* v. *United States,* 213 U. S. 522, which is inapplicable, because it deals exclusively with the common carrier activities of the Express Company. The company held itself out as a common carrier of express matter for all alike. Its published tariffs were on file. The Commission, therefore, had complete jurisdiction over these common carrier activities. There was no question made in the case of any private carrier service, because there was none involved. The Court held that it was a discrimination under the Elkins Act to issue passes to a limited class for the transportation of express matter, with the result that the Express Company, while in the performance of its common carrier duties, would be carrying for some persons at a less rate than for others. The case dealt exclusively with discrimination with respect to common carrier activities.

Counsel also cite *Louisville & Nashville R. Co.* v. *Tennessee,* 262 U. S. 319. There, as in the other cases cited by defendants, the Court dealt with the common carrier activities of the companies involved. The State of Tennessee sought to set aside an order of the Commission which directed the removal of discrimination against interstate commerce brought about by lower intrastate rates on carload shipments of stone and gravel for use in the building of public highways and consigned to federal, state, county and municipal authorities. The lower rates had been put into effect by the state authorities.

Both the state rates and the interstate rates were published rates, duly filed. The railway company was admittedly a common carrier with respect thereto. The sole question presented was whether the lower state rates were discriminatory, as against interstate commerce; and it was held that they were. The Court was therefore dealing with a common carrier service, over which the Commission had jurisdiction. The question of private carrier service was not involved in the case, and was not considered.

The other authorities upon which defendants rely also deal with common carrier activities. They cite no decision dealing with private carrier activities of railway companies.

V.

The Commission has no authority by administrative order to convert a private carrier service into a common carrier service.

It is unnecessary to remind the Court that the authority of the Commission is wholly statutory, and that it cannot lawfully exceed the specific powers thus granted to it.

The manifold regulations embodied in the Interstate Commerce Act deal solely and exclusively with the common carrier activities of railway companies. There is nowhere in the entire Act any intimation whatsoever that Congress intended to delegate to the Commission any power of control or regulation over railway companies in the performance of their private carrier activities. It is entirely plain, therefore, that if the movement of an office car is a private carrier service, as we contend it is, then the Commission has no statutory power to interfere or impose any regulations whatsoever. The authorities which are cited *supra* also support this contention.

Furthermore, the power of the Commission or of any regulatory body is limited "to the undertaking which the carrier has expressly or impliedly assumed" (*Northern Pacific R. Co.* v. *North Dakota,* 236 U. S. 585, 595). The Court there adds:

> If it has held itself out as a carrier of passengers only, it cannot be compelled to carry freight.

Of course, the converse is true. A railway company may hold itself out as a carrier of freight only, and cannot be compelled to carry passengers (*Wiggins Ferry Co.* v. *East St. Louis R. Co.,* 107 Ill. 450). We called attention in our original brief (p. 43) to the decisions of this Court holding that a private carrier cannot be changed into a common carrier by any legislative fiat, or by any order of the Commission.

How, then, can the Commission by any order it may make convert a private carrier service in transporting office cars into a common carrier service? We earnestly contend that this cannot be done.

Finally, we invoke the rule that the power to regulate commerce is not absolute, but is subject to the limitations and guarantees of the Constitution among which are liberty of contract and the right of property, which, we contend, the Commission's order violates. In *United States* v. *Chicago, Milwaukee, St. Paul & Pacific R. Co.,* decided January 5, 1931, this Court said:

> The power to regulate commerce is not absolute, but is subject to the limitations and guarantees of the Constitution, among which are those providing that private property shall not be taken for public use without just compensation and that no person shall be deprived of life, liberty or property without

due process of law. Monongahela Navigation Co. *v.* United States, 148 U. S. 312, 336; United States *v.* Joint Traffic Association, 171 U. S. 505, 571-572; Adair *v.* United States, 208 U. S. 161, 180. Both the liberty of contract and the right to property here are involved.

Plaintiffs claim the protection of these constitutional guaranties. They claim the right to use their property in the manner in which the property has been used for many decades. They claim the right to contract with other carriers in reference to the movement of their office cars and the office cars of other carriers in the same manner as that right has always been exercised. They earnestly and confidently contend that this right cannot be destroyed by an administrative order of the Commission, commanding carriers to cease the performance of a private carrier service, or, in the alternative, to convert it into a common carrier service subject to public regulation.

Respectfully submitted,

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January 12, 1931.

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No. 517

In the Supreme Court of the United States

OCTOBER TERM, 1930

THE KANSAS CITY SOUTHERN RAILWAY COMPANY AND TEXARKANA & FORT SMITH RAILWAY COMPANY, APPELLANTS

v.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLEES

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

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JANUARY, 1931.

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Section 6 (1) (c. 3591, 34 Stat. 586; c. 91, 41 Stat. 483; U. S. C. Title 49, sec. 6 (1))	4
Section 6 (7) (c. 3591, 34 Stat. 587; c. 91, 41 Stat. 483; U. S. C. Title 49, sec. 6 (7))	5
Section 22 (1) (25 Stat. 855; U. S. C. Title 49, sec. 22 (1))	9

In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 517

THE KANSAS CITY SOUTHERN RAILWAY COMPANY and Texarkana and Fort Smith Railway Company, appellants

v.

THE UNITED STATES OF AMERICA AND INTERSTATE Commerce Commission, appellees

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

OPINIONS

The opinion of the specially-constituted District Court (R. 140) has not been reported.

The report of the Interstate Commerce Commission (R. 101) is reported in 155 I. C. C. 775.

QUESTIONS PRESENTED

The following jurisdictional question is presented:

Whether, after suit to enjoin an order of the Interstate Commerce Commission under the Urgent

Deficiencies Act (c. 32, 38 Stat. 208, 220, U. S. C. Title 28, Sec. 47) has been instituted in one judicial district by certain carriers, another suit, or other suits, to enjoin the order may be instituted and contemporaneously maintained in another judicial district, or districts, by other carriers affected by the order, in view of the right given them by said Act to make themselves parties to the suit already instituted.

The ultimate question presented on the merits is:

Whether an order of the Commission requiring carriers to cease and desist from the transportation of private passenger train cars, including so-called office cars, of other carriers free, at other than published tariff rates, is invalid in so far as it forbids the transportation free by one carrier of the office car of another carrier "when occupied by its officers and employees, lawfully entitled to transportation, and traveling in the interest of or in connection with the business of such railroad."

Subordinate questions, which relate to the validity of the part of the order above described, are:

1. Whether a carrier, otherwise subject to the Interstate Commerce Act, in transporting free and without publication of tariff charges an office car of another carrier occupied by an officer or other employee of that carrier, lawfully entitled to a personal pass and engaged in his company's business, acts as a private carrier, not subject to the provisions of the Interstate Commerce Act or to the authority of the Commission under the Act.

2. Whether the Commission's finding that it is unjustly discriminatory and unduly preferential and prejudicial to transport the private passenger cars, including so-called office cars, of other carriers free while charging certain minimum fares and revenues for the movement of other privately owned or chartered cars is supported by substantial evidence.

3. Whether the Commission, in its decisions in the past, has construed the interstate commerce act as permitting one carrier subject to that act to transport free the office cars of another such carrier, when occupied as above described, and, if so, whether such construction is not plainly erroneous.

STATUTES INVOLVED

The pertinent provisions of the Interstate Commerce Act read as follows:

> SECTION 1 (4). It shall be the duty of every common carrier subject to this Act engaged in the transportation of passengers or property to provide and furnish such transportation upon reasonable request therefor, and to establish through routes, and just and reasonable rates, fares and charges applicable thereto and to provide reasonable facilities for operating through routes and to make reasonable rules and regulations with respect to the operation of through routes, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to

establish just, reasonable, and equitable divisions thereof as between the carriers subject to this Act participating therein which shall not unduly prefer or prejudice any of such participating carriers. (c. 91, 41 Stat. 475; U. S. C. Title 49, Sec. 1 (4).)

SECTION 6 (1). That every common carrier subject to the provisions of this Act shall file with the Commission created by this Act and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print, and keep open to public inspection as aforesaid, the separately established rates, fares, and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and

charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedule shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this Act. (c. 3591, 34 Stat. 586; c. 91, 41 Stat. 483; U. S. C. Title 49, Sec. 6 (1).)

(7) No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property, as defined in this Act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges, or facilities in the trans-

portation of passengers or property, except such as are specified in such tariffs. (c. 3591, 34 Stat. 587; c. 91, 41 Stat. 483; U. S. C. Title 49, sec. 6 (7).)

SECTION 2. That if any common carrier subject to the provisions of this Act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property or the transmission of intelligence, subject to the provisions of this Act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation or transmission of a like kind or traffic or message under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful. (c. 104, 24 Stat. 379; c. 91, 41 Stat. 479; U. S. C. Title 49, sec. 2.)

SECTION 3 (1). That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality or any particular description of traffic, to any

undue or unreasonable prejudice or disadvantage in any respect whatsoever. c. 104, 24 Stat. 380; c. 91, 41 Stat. 479; U. S. C. Title 49, sec. 3 (1).)

SECTION 1 (7). No common carrier subject to the provisions of this Act shall, after January first, nineteen hundred and seven, directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers, except to its employees and their families, its officers, agents, surgeons, physicians, and attorneys at law; to ministers of religion, traveling secretaries of railroad Young Men's Christian Associations, inmates of hospitals, and charitable and eleemosynary institutions, and persons exclusively engaged in charitable and eleemosynary work; to indigent, destitute, and homeles persons, and to such persons when transported by charitable soci[redacted]es or hospitals, and the necessary ag[redacted] employed in such transportation; to [redacted]ates of the National Homes or State Homes for Disabled Volunteer Soldiers, and of Soldiers' and Sailors' Homes, including those about to enter and those returning home after discharge; to necessary caretakers of live stock, poultry, milk, and fruit; to employees on sleeping cars, express cars, and to linemen of telegraph and telephone companies; to Railway Mail Service employees, post-office inspectors, customs inspectors, and immigration inspectors; to newsboys on trains, baggage agents, witnesses attending any legal investigation in which the common carrier

is interested, persons injured in wrecks and physicians and nurses attending such persons: *Provided, That this provision shall not be construed to prohibit the interchange of passes for the officers, agents, and employees of common carriers, and their families;* nor to prohibit any common carrier from carrying passengers free with the object of providing relief in cases of general epidemic, pestilence, or other calamitous visitation: *And provided further*, That this provision shall not be construed to prohibit the privilege of passes or franks, or the exchange thereof with each other, for the officers, agents, employees, and their families of such telegraph, telephone, and cable lines, and the officers, agents, employees, and their families of other common carriers, subject to the provisions of this Act: *Provided further*, That the term "employees" as used in this paragraph shall include furloughed, pensioned, and superannuated employees, persons who have become disabled or infirm in the service of any such common carrier, and the remains of a person killed in the employment of a carrier and ex-employees traveling for the purpose of entering the service of any such common carrier; and the term "families" as used in this paragraph shall include the families of those persons named in this proviso, also the families of persons killed, and the widows during widowhood and minor children during minority of persons who died, while in the service of any such common carrier. Any common carrier violat-

ing this provision shall be deemed guilty of a misdemeanor, and for each offense, on conviction, shall pay to the United States a penalty of not less than one hundred dollars nor more than two thousand dollars, and any person, other than the persons excepted in this provision, who uses any such interstate free ticket, free pass, or free transportation shall be subject to a like penalty. Jurisdiction of offenses under this provision shall be the same as that provided for offenses in an Act entitled "An Act to further regulate commerce with foreign nations and among the States," approved February nineteenth, nineteen hundred and three, and any amendment thereof. (c. 3591, 34 Stat. 584, 585; U. S. C. Title 49, sec. 1 (7).)

Section 22 provides in part—

(1) That nothing in this Act shall prevent the carriage, storage, or handling of property free or at reduced rates, for the United States, State, or municipal governments, or for charitable purposes, or to or from fairs and expositions for exposition thereat. * * * Nothing in this Act shall be construed to prevent railroads from giving free carriage to their own officers and employees, *or to prevent the principle officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employees;* * * * Nothing in this Act shall prevent any carrier or carriers subject to this Act from giving reduced rates for the

transportation of property to or from any section of the country with the object of providing relief in case of earthquake, flood, fire, famine, drought, epidemic, pestilence, or other calamitous visitation or disaster, if such reduced rates have first been authorized by order of the Commission (with or without a hearing); but in any such order the Commission shall define such section and shall specify the period during which such reduced rates are to remain in effect. (25 Stat. 855; U. S. C. Title 49, sec. 22 (1).)

STATEMENT

Appellants brought suit in the United States District Court for the Western District of Missouri, Western Division, sitting as a specially constituted three-judge court, to set aside and enjoin the following two orders of the Interstate Commerce Commission:

(1) Order entered by the Commission November 4, 1929, in No. 17757, *In the Matter of Use of Private Passenger Train Cars,* 155 I. C. C. 775, which required appellants and other carriers therein named to cease and desist "from the transportation or movement of private passenger train cars, including so-called office cars, of another carrier free or at other than published tariff rates." (R. 11, 12.)

(2) Order made by the Commission, Division 4, July 30, 1929, amending in particulars which will be hereinafter described, the Commission's Regu-

lations to Govern the Form and Recording of Passes. (R. 13.)

The proceeding, in which the first above-described order was entered, was instituted December 7, 1925, on the Commission's own motion pursuant to authority conferred upon it by Section 13 (2) of the Interstate Commerce Act (c. 309, 36 Stat. 551; U. S. C. Title 49, sec. 13 (2)). A questionnaire was sent to all Class I[1] and II carriers and to switching and terminal carriers, calling for information as to private passenger-train cars owned, leased, or operated, the movement or use of such cars as were transported free or at less than tariff rates on home and foreign lines, and the occupants of such cars on respective trips. Returns were filed, under oath, by 387 carriers, covering the calendar years 1923, 1924, and 1925.

The salient facts are that carriers transported free of charge the private, or office, cars of other carriers when occupied by perons, for whose transportation the law permits a pass to be issued, such as the officials and employees of other carriers, and their families; that they performed incidental, or accessorial, transportation free of charge, when the cars were not so occupied, as for example, in moving the cars "deadhead"[2] to stations where they

[1] Class I: Annual operating revenues above $1,000,000. In 1925 Class I carriers operated about 91 per cent of the railroad mileage of the United States.

[2] "Not occupied, except in some instances by an attendant." (R. 107.)

were to be occupied, in returning them "deadhead" to their home stations after occupancy, or in switching and storing the cars when awaiting occupancy (R. 107, 105, 106); and that the owning roads, or occupying pass holders, retained dominion over such private or office cars, when moving, or held, on foreign roads, for their own particular use,[3] and the foreign roads were not at liberty to make other use of the cars (R. 115; Br. 12). The further fact should here be mentioned that the carriers published and exacted certain minimum fares and surcharges (usually 25) for the transportation of other privately owned, or chartered, cars, which were the same whether a car was occupied by 1 or 25 passengers. (R. 113, 114, 118.)

On July 23, 1928, a proposed report was served upon appellants and all other carriers (R. 3) which reached the conclusion and finding that the practice of transporting free or at other than published tariff rates the private, or office, cars of other carriers was contrary to the provisions of the Interstate Commerce Act, and that it resulted in unjust discrimination and the according of undue preference. Subsequently the carriers named in the Commission's order of November 4, 1929, "appeared and by counsel excepted to said report, on which exceptions argument, oral and in writing, was had." (R. 11.) On June 21, 1929, the Commission issued its report in the proceeding, wherein

[3] Ticket passengers sometimes occupy the cars, but only on invitation of the occupying pass holder. (R. 115.)

it adopted the conclusion and findings recommended in the proposed report. The carriers were admonished that they would "be expected to cease and desist from the violations of the Act herein found" (R. 101 to 120), but no order was entered at that time. The order issued in the proceeding, namely, the above-described order of November 4, 1929, was entered after the carriers, against whom it is directed, had "waived any further or additional hearing before the Commission to that which had been given prior to said order." (R. 100, 12.) In preliminary recitals contained in the order the findings made in the Commission's report (R. 118, 119, 120) were condensed to read as follows:

> 1. That the transportation or movement of private passenger cars, including so-called office cars, of one carrier subject to the Interstate Commerce Act by another such carrier free or at other than published tariff rates is contrary to the provisions of the Interstate Commerce Act;
>
> 2. That it is unjustly discriminatory and unduly preferential and prejudicial to haul such private cars of other carriers free, or at less than published tariff rates, while charging certain minimum fares and revenues for the movement of privately owned or chartered cars; and
>
> 3. That the transportation of persons in such private passenger cars, including berth and other accommodations, at the rate charged passengers provided only with or-

> dinary coach accommodations is unjustly discriminatory and unduly preferential and prejudicial. (R. 12.)

The other order here involved, namely, that made July 30, 1929, "by the Commission, Division 4," (R. 13) amending the Commission's Regulations to Govern the Forms and Recording of Passes is not an order entered in the *Private Car case*. Its making, however, was induced by contentions advanced in that proceeding to the effect that the form of pass prescribed by the then regulations, which included the word "car," covered foreign-line cars as well as home-line cars. (R. 116.) The Commission pointed out reasons why such interpretation could not properly be attributed to its form of pass, but, in order to remove the matter beyond dispute, it added by its amendment the express statement that "a car pass may be issued only for cars owned by the issuing carier or held by it under lease" and that "it may not be issued for other cars."

Prior to the filing of the petition herein involved and on, to wit, the 14th day of December, 1930, the Louisville & Nashville Railroad Company, and four other independent carriers, suing on behalf of themselves and of all other carriers which might have an interest in the premises, filed a petition in the United States District Court for the Western District of Kentucky, to enjoin the above-described orders of the Commission in so far as they pro-

hibited the petitioners and other carriers from transporting free of charge the private or so-called office cars of other carriers, when occupied by a person or persons lawfully using free transportation over the lines of the moving road. Decision in that case was rendered on May 28, 1930, and was called to the attention of the lower court in the instant suit. (R. 74 to 83.)

While the *Kentucky case* was pending, and on, to wit, February 7, 1930, appellants, suing on their own behalf only, filed their petition, asking for relief which was covered by the relief asked for in the *Kentucky case*, namely, for the enjoining of the Commission's orders in so far as they prohibited free transportation of the *office cars* of other carriers, when occupied by officers or employees, lawfully entitled to free transportation and engaged in business of their companies. (R. 10.) The case was argued and submitted as on final hearing on the application for permanent injunction. August 27, 1930, the court rendered its opinion upon final hearing. (R. 140.) September 19, 1930, final decree was entered dismissing the petition for want of equity. (R. 84.)

SUMMARY OF ARGUMENT

I. The Urgent Deficiencies Act, which provides for specially constituted courts of three judges, expedited procedure and direct appeals to the Supreme Court, does not authorize parties, seeking

the same or substantially the same relief from a Commission order, to bring successive suits in different judicial courts to enjoin the order.

II. The transportation free, and without published tariff charge by one carrier subject to the Interstate Commerce Act, of the office car of another such carrier, occupied by an officer or employee, entitled to a personal pass, and engaged in his company's business, is not private transportation outside the provisions of said act and the jurisdiction of the Commission.

1. Appellants' contention that, in transporting the office cars of other carriers they do not act as common carriers subject to the Act because they perform the transportation free and without publication of traiff charges, is in effect a contention that, by their very violation of the Act in performing certain transportation, they make themselves private carriers not subject to the Act as to that transportation and free to continue the violation.

2. The exception in the Act permitting issuance of passes for free transportation of specified individuals must be construed with due regard to its manifest purpose and when so construed it does not permit of free transportation of a private or office car along with the individual.

3. Appellants' practice can not be likened to intercarrier contracts for trackage rights, or for detour movements and return of astray shipments of propety of the general public in course of trans-

portation—it is intercarrier only in the sense that it is the giving of free transportation service by one carrier to another or to the latter's official.

III. The principal of statutory construction whereunder the interpretation given to ambiguous language in a statute by the body charged with its administration is held to have been adopted by Congress, if the statute is subsequently reenacted without change in the particulars so construed, which appellants have invoked in defense of their practice, is inapplicable because the language of the statute is plain and unambiguous and because the Commission has not given to the statute the interpretation contended for by appellants.

ARGUMENT

I. THE URGENT DEFICIENCIES ACT DOES NOT AUTHORIZE PARTIES, SEEKING THE SAME OR SUBSTANTIALLY THE SAME, RELIEF FROM A COMMISSION ORDER, TO BRING SUCCESSIVE SUITS IN DIFFERENT JUDICIAL DISTRICTS TO ENJOIN THE ORDER

As heretofore said, prior to the institution of this suit to enjoin the above-described orders of the Commission the Louisville & Nashville Railroad Company and four other railroads brought suit under the Urgent Deficiencies Act (c. 32, 38 Stat. 208, 220; U. S. C. Title 28, sec. 47) to enjoin the same orders in the United States District Court for the Western District of Kentucky, in which suit the relief asked for included the relief which is here sought by appellants. Decision was ren-

dered in that case before the instant case was heard, and was brought to the lower court's attention by amendment to the Commission's answer. (R. 74, 75.) Appellants could have exercised their right to be made parties to the original suit and could therein have presented their contentions along with those of the other railroads. A single adjudication as to the validity or invalidity of the orders, upon any ground alleged, could have been obtained.

The jurisdiction involved in both cases grows out of the Commerce Court Act (c. 309, 36 Stat. 1146; U. S. C. Title 28, sec. 41 (27)). That Act created the Commerce Court and conferred upon it, among other things,[4] jurisdiction over "cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission." The Urgent Deficiencies Act transferred that jurisdiction of the Commerce Court to the several district courts of the United States. It provides for specially-constituted courts of three judges "of whom at least one shall be a circuit judge" to hear and determine said cases. Applications for permanent injunction, for preliminary injunction, and for temporary stays must all be acted upon by the three judges. The cases are expedited and direct appeal lies to this court.

The venue provisions read as follows:

> The venue of any suit hereafter brought to enforce, suspend, or set aside, in whole or

[4] To enforce Commission orders, and certain other cases arising under I. C. Act.

> in part, any order of the Interstate Commerce Commission shall be in the judicial district wherein is the residence of the party or any of the parties upon whose petition the order was made, except that where the order does not relate to transportation or is not made upon the petition of any party the venue shall be in the district where the matter complained of in the petition before the Commission arises, and except that where the order does not relate either to transportation or to a matter so complained of before the Commission the matter covered by the order shall be deemed to arise in the district where one of the petitioners in court has either its principal office or its principal operating office. In case such transportation relates to a through shipment the term "destination" shall be construed as meaning final destination of such shipment.

In view of the facts that Commission orders are often made upon petition of numerous parties, that they are often made in proceedings instituted upon its own motion "and not upon the petition of any party," and that they often cover a wide territorial scope, it is clear that many cases, like the instant one, afford a broad election of venue. But, heretofore, when such situations have existed either independent suits have been instituted in the same district and consolidated for hearing and decision, or, more often, one suit has been instituted and other parties affected by the order have inter-

vened.[5] Frequently intervenors in such suits present to the courts views of the law different and even inconsistent with those of the party bringing the suit. That the Act contemplates that, once the jurisdiction of a court of proper venue, has been invoked by a party having standing, other parties seeking the same relief must appear before the same tribunal is shown by the fact that it expressly adopted the procedure of the Commerce Court (c. 32, 38 Stat. 220; U. S. C., Supp. II, Title 28, sec. 44), which was conceived with a view to caring for the many rights and interests that may be affected by a Commission order in a single suit to test the validity of the order. Section 212 of the Commerce Court Act reads:

> The Attorney General shall have charge and control of the interests of the Government in all cases and proceedings in the Commerce Court, * * * *Provided,* That the Interstate Commerce Commission and any party or parties in interest to the proceeding before the commission, in which an order or requirement is made, may appear as parties thereto *of their own motion* and *as of*

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[5] *Assigned Car Cases*, 274 U. S. 564 (93 I. C. C. 701); *United States* v. *Anchor Coal Co.* (*Lake Cargo Coal Cases*), 279 U. S. 812 (25 F. (2d) 462); *Beaumont, Sour Lake & W. Ry. et al.*, v. *United States* (*Southwestern-Western Divisions Case*), decided Nov. 24, 1930 (36 F. (2d) 789); *A. T. & S. F. Ry.* v. *United States* (*Export Grain Case*), 279 U. S. 768 (33 F. (2d) 345); *T. & P. Ry.* v. *United States* (*Gulf Ports Preference Case*), U. S. Dist. Ct. Southern Dist. Tex., Galveston Division, decided June 16, 1930 (160 I. C. C. 345).

> *right,* and be represented by their counsel, in any suit wherein is involved the validity of such order or requirement or any part thereof, and the interest of such party; and the court wherein is pending such suit may make all such rules and orders as to such appearances and representations, the number of counsel, and all matters of procedure, and otherwise, as to subserve the ends of justice and speed the determination of such suits: *Provided further,* That communities, associations, corporations, firms, and individuals who are interested in the controversy or question before the Interstate Commerce Commission, or in any suit which may be brought by any one under the provisions of this chapter, * * * may intervene in said suit or proceedings at any time after the institution thereof; and the Attorney General shall not dispose of or discontinue said suit or proceeding over the objection of *such party or intervenor* aforesaid, but said intervenor or intervenors *may prosecute,* defend, or continue said suit or proceeding unaffected by the action or nonaction of the Attorney General therein. (U. S. C., Supp. II, Title 28, sec. 45a.) (Italic ours.)

The right so given to parties in interest to a Commission proceeding to appear in any suit involving the Commission's order is something more than the usual right of intervenors. It is that they "may appear as parties thereto *on their own motion,* and *as of right* and be represented by their counsel." If they have such standing as would

entitle them to maintain a separate suit in another judicial district, it can not be doubted but that they could press to a conclusion any suit in which they had intervened, or appeared *as of right,* regardless of the action or nonaction of the plaintiff named in the original bill; (compare *Sprunt & Son* v. *United States,* 281 U. S. 249) for such right is expressly given them even in a suit instituted by the Attorney General, as, for example, one to enforce an order of the Commission. In short, the Urgent Deficiencies Act must be interpreted in light of the fact that the jurisdiction and procedure (except as supplemented) thereunder was once that of a single court whose machinery was especially adopted to afford in a single suit opportunity of hearing upon legal questions to the many interests affected by a Commission order. The Commerce Court Act was named an amendment to the Act to Regulate Commerce and "was intended to be but a part of the existing system for the regulation of interstate commerce" (*Procter & Gamble Co.* v. *United States,* 225 U. S. 282, 294, 295), and, therefore, the provisions of the Urgent Deficiencies Act must be construed harmoniously with the whole scheme of regulation. *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.,* 204 U. S. 426, 441, 442; *Harriman* v. *Interstate Com. Comm.,* 211 U. S. 407, 419, 420; *Procter & Gamble Case, supra.*

Congress transferred the jurisdiction of the Commerce Court to the many District Courts, but,

since it at the same time adopted that court's procedure conceived with a view to enable all parties in interest to appear in a single suit and to enable the court to consider their rights and views in a single suit, it is apparent that it was not its purpose that those rights and views should be separately considered and determined by different courts, or even by the same court in independent and later suits. The supplemental procedural provisions added by the Urgent Deficiencies Act for three-judge courts, expedition and direct appeal only lend greater force to this view, in that they show that it was Congress' intention to provide for a single special tribunal in each case, which would consider all questions, and for a special procedure whereunder prompt and final disposition thereof would be made in the public interest.

Of course there are Commission orders which are clearly severable into parts for purpose of separate injunction suits, but here the relief asked for in the second suit is included in the relief asked for in the first suit. If, after a suit has been filed in one district by a party, a second suit may be filed in another district, by another party in interest, and, if after decision by the one specially constituted court, the second suit may be pressed for hearing and decision before another specially constituted court, of course it would follow that there is authority under the Act for still other such suits, further burdening the courts and delaying

administrative relief granted by the Commission. When consideration is given to this, the purpose of Congress to authorize a single suit, similarly as under Commerce Court Act, is clear.

II. THE TRANSPORTATION FREE, AND WITHOUT PUBLISHED TARIFF CHARGE BY ONE CARRIER SUBJECT TO THE INTERSTATE COMMERCE ACT OF THE OFFICE CAR OF ANOTHER SUCH CARRIER, OCCUPIED BY AN OFFICER OR EMPLOYEE, ENTITLED TO A PERSONAL PASS, AND ENGAGED IN HIS COMPANY'S BUSINESS, IS NOT PRIVATE TRANSPORTATION OUTSIDE THE PROVISIONS OF SAID ACT AND THE JURISDICTION OF THE COMMISSION

Assembling in summarized form the provisions of the Interstate Commerce Act here involved: Section 1 (4) makes it the duty of carriers subject to the Act to furnish transportation upon reasonable request therefor and to establish just and reasonable rates, fares, and charges. Section 6 requires the carriers to file and publish all rates or charges for transportation between points on their own lines and between points on their own lines and points on the lines of other carriers. It forbids a carrier from transporting property or passengers unless the rates or charges upon which same are transported have been filed and published; from charging any different compensation than that specified in the published tariffs and from extending to any shipper or *person* any privileges or facilites except such as are specified in its tariffs. Section 2 forbids any unjust discrimination in charges for transportation of property or persons under

substantially similar circumstances and conditions. Section 3 forbids the giving of any undue preference or advantage to any person or corporation or any particular description of traffic in any respect whatsoever. The only exceptions in any way qualifying the above requirements and prohibitions are: (1) As to property, section 22 contains an exception, which permits transportation free or at reduced rates for the United States, for the States and Municipalities and for certain charitable purposes; and (2) as to persons, section 22 and paragraph (7) of section 1 contain exceptions to the prohibitions against "free passes" or "free tickets," which permit the carriers to grant passes for certain charitable purposes and for certain other named purposes, with which we are not here concerned, and permit them to grant passes to their own officials, employees and their families *and to interchange passes for the officers, agents, and employees of common carriers, and their families.*

Appellants admit that, prior to the Commission's decision herein involved, it was their practice to transport the office car of another carrier free of charge and without publication of tariff charge for its transportation, when occupied by an officer or employee, lawfully entitled to free transportation, and engaged in company business. Moreover, if an official of the owning carrier made a stop at a business center, it is clear that the car had to be either switched and held on the foreign line (as the office of the owning carrier's official) or returned to its

home line. (R. 5.) If it was returned to its home line, it had to be transported back to the pass holder for his return trip. (R. 107.) In justification of their practice, they state that a railroad official must occasionally travel on business to points on other carriers' lines and must have with him "correspondence, office files, blue prints, etc." (Br. 9 to 11; R. 4, 6.)

Obviously, application of the Act's prohibitions against transporting property without tariff charges on file, against extending to any person any privileges or facilities except as specified in published tariffs, against unjust discriminations, and against the giving of any undue preference "in any respect whatsoever," can not be lawfully made to depend upon ownership of the property transported, or upon the individual or corporation, for whom the service is performed, since the fundamental purpose of those provisions and of the Act as a whole was to do away with discriminations based on any such distinctions. *Houston, etc., Ry.* v. *United States*, 234 U. S. 342, 356. The Act makes no exceptions permitting carriers to favor other carriers in the transportation of property (*Int. Comm. Com.* v. *B. & O. R. Co.*, 225 U. S. 326), and the exception permitting interchange of passes for officials and employees of common carriers clearly can not be construed to allow of the free transportation of a whole private car as well as the person of a passholder. Such construction would be contrary to the manifest purpose of the

exception. *Nashville, Chattanooga & St. L. Ry.* v. *Tennessee*, 262 U. S. 318, 323. It would disregard the elementary rule that exceptions from a policy embodied in a statute must be strictly construed. *Spokane & Inland R. Co.* v. *United States*, 241 U. S. 344, 350. It would, in fact, add to the Act and entirely new exception. *L. & N. R. Co.* v. *Motley*, 219 U. S. 467, 479.

Before passing to appellants' legal contentions, the court's attention is called to the fact that while appellants technically base their standing to maintain this suit on the allegation that the Commission's orders will deprive them "of the right to make a lawful use of their properties * * * and consequently to deprive them of their properties without due process of law" contrary to the Fifth Constitutional Amendment (R. 9, 10), the body of their petition (R. 4, 5) and much of their argument shows that their only grievance of substance is that other carriers are no longer free (if they choose so to do) to transport appellants' cars without charge. Since the requirement in the Commission's order is that appellants desist from transporting the office cars of other carriers without compensation, it is difficult to construe it as a taking of their property without due compensation. Appellants, of course, have no legal right to have other carriers transport their office cars free, which could be asserted as giving them standing to maintain this suit.

Appellants have construed the comment of the Commission, that business reasons may in some cases justify the movement of an office car off home lines (R. 108), as meaning that such movement might be justified in some cases free of charge. What is pointed out by the Commission is that, while the use of a private car equipped with profiles, maps, blue prints, and company records is warranted on home lines, it is seldom necessary on trips for business reasons off home lines. The Commission's order, of course, does not prevent the use of an office car on foreign lines provided a charge for the transportation is published and collected.

1. A common carrier subject to the act can not make of itself a private carrier as to particular transportation by its failure to comply with the terms of the act in conducting that transportation

Giving separate consideration to section 6 of the Act, paragraph (1) thereof requires the carriers to file and keep open to public inspection all rates and charges between points on their own lines and between points on their lines and the lines of other carriers. Because of its importance, paragraph (7) of said section is again set forth in full, and reads as follows:

> No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property, as defined in this Act, unless the rates, fares, and charges upon which the same are trans-

> ported by said carrier have been filed and published in accordance with the provisions of this Act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.

In short, a carrier is forbidden to transport property unless the charge for its transportation has been filed and published. It can not charge or receive a greater or less or different compensation than that specified in its tariff rates, directly or by any indirect means. It is forbidden to extend to any shipper or *person* any privilege or facility in the transportation of passengers or property except such as are specified in its tariffs.

The violations of section 6, of which appellants are guilty, are that they transported property without tariff charges on file for its transportation and extended to persons privileges or facilities not named in their tariffs. Those violations are of the provisions of the Act itself, which surely must be

as strictly observed as tariffs filed in furtherance of said provisions. If the transportation of office cars here involved were for noncarrier corporations, or for persons not traveling on passes, it may be assumed that appellants would not contend that, by neglecting to publish charges therefor, they would become privileged to perform the transportation free of charge.

In *Legality of Express Franks*, 50 I. C. C. 599, it was said at page 603:

> The free carriage either of persons or of property is contrary to the general principles to be found in the act to regulate commerce, as amended. See sections 2, 3, and 6. * * * Any free carriage of passengers that is now lawful is authorized in the form of exceptions to the general principle to be found in the so-called antipass provision of section 1 of the act. Any free carriage of property that is lawful is to be found in the exceptions noted in section 22 of the act.

In *L. & N. R. Co.* v. *Mottley*, 219 U. S. 467, this court said at pages 478 and 479:

> Manifestly, from the face of the commerce act itself, Congress, before taking final action, considered the question as to what exceptions, if any, should be made in respect of the prohibition of free tickets, free passes and free transportation. It solved the question when, without making any exceptions *of existing contracts,* it forbade by broad, explicit words *any* carrier to charge, de-

> mand, collect or receive a "greater or less *or different* compensation" for *any* services in connection with the transportation of passengers or property than was specified in its published schedules of rates. The court can not add an exception based on equitable grounds when Congress forbore to make such an exception.

As heretofore shown, the Act's only exceptions permitting of free transportation of property are confined to transportation of property for certain governmental and charitable purposes. Appellants do not contend that the transportation of private cars of other carriers falls within any of those exceptions.

Moreover, appellants admit that "Office cars constitute no part of the transporting carrier's passenger equipment and are not available for use by passengers generally" (Br. 12), which admission is in sharp contrast with the position taken by appellants in the companion case (*Louisville & Nashville R. R.* v. *United States,* No. 333) that the private or office car of one carrier on the line of another is not property subject to transportation charges when occupied by a person entitled to free transportation, because under such circumstances it becomes the transporting carrier's facility of transportation. By thus conceding that an office car on another carrier's line is no part of the transporting carrier's equipment appellants recognize what is clearly true, namely, it is transported by

the foreign line as the property of another and for his benefit.[6]

At the same time appellants do not dispute the fact that rolling equipment of every kind is subject to transportation charges under section 6 of the Act when transported as the property of another carrier and for its benefit. Appellants' tariffs give recognition to this, in that they name charges on all kinds of cars transported on their own wheels. They apply on new cars moving from the shops, on movements to and from off-line repair shops and on any other movements over foreign lines not in regular service.[7] (Br. 13; R. 112.) Furthermore, appellants do not dispute the fact that private cars of individuals or corporations are similarly recognized by them as "property" subject to transportation charges. (Br. 45.) For privately-owned or chartered cars the tariffs name a fixed number of fares and of surcharges (usually 25) and they also call for a minimum flat charge. (R. 113.) That these charges cover the service of transporting the car "is apparent from

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[6] The foreign line is not at liberty to make use of the car for its own purposes. Ticket passengers sometimes occupy it but only on invitation of the pass holder. (R. 115; Br. 12.)

[7] Freight and passenger cars, moving in interchange service under revenue-producing load, are not subject to transportation charges. The distinction is that they move under through rates (joint or combination) and they are made the foreign line's equipment by payment of a sum called a "per diem" or other form of rental. (R. 112.)

the fact that they are the same, whether the car is occupied by 1 passenger or 25." (R. 118.)

And yet appellants assert that the office car of one carrier transported by another is not subject to the requirements of section 6 as to publication and observance of tariff charges, provided that it is occupied by an officer or employee traveling on a personal pass and engaged in company business. Their contention is that such transportation is private transportation, not subject to the Act, and that in performing such transportation a common carrier otherwise subject to the Act, is a private carrier not subject to the Act. Since, however, they concede that cars transported for another carrier are subject to transportation charges, that privately-owned or chartered cars are subject to transportation charges, and that the office cars of railroads on a foreign line are transported, not as the transporting carrier's equipment, but for the owning line's benefit, the distinction, which makes the transportation of office cars private transportation not subject to the Act, narrows down to the failure to observe the requirements of section 6 to publish and collect tariff charges. And such is, in fact, their position. They assert that, because they have never named charges in their tariffs on office cars of other carriers, but instead have transported them free and without publication of charges, when occupied by an official, entitled to free transportation and traveling on company business—reserving,

however, "the right to grant or refuse the movement"—they have not held themselves out as common carriers of the office cars of other carriers; that the transportation so conducted is private transportation not subject to the Act; and that they, in performing it, are private carriers not subject to the Act.

But a carrier subject to the Act can not make of itself a carrier not subject to the Act as to particular transportation by violating the Act in its method of conducting such transportation. Section 6 forbids the transportation of property or passengers unless the charges for the transportation have been filed and published. The evil of preferences and discriminations was the principal thing aimed at by the Act to Regulate Commerce. *Houston, etc., Ry.* v. *United States* (*The Shreveport Case*), 234 U. S. 342, 356; *Kansas City Ry. Co.* v. *Albers Comm. Co.*, 233 U. S. 573, 597; *L. & N. R. R. Co.* v. *Mottley*, 219 U. S. 344, 350. And in *Southern Ry. Co.* v. *Reid*, 222 U. S. 424, this court said (p. 442) that the amendments made by section 2 of the Hepburn Act of 1906 (c. 3591, 34 Stat. 586) to section 6 of the Act to Regulate Commerce show that Congress had come to believe

> that the most effective way to prevent preferences in charges by carriers was to forbid them to "engage or participate in the transportation of passengers or property" until they had fixed and proclaimed the rate to be charged therefor—a rate that would be

> not only for one shipper or shipment, but for all shippers and shipments; not for one time only, but for all times.

Distinctions in transportation service or charges, based on the person or corporation for whom the service is performed, is the very essence of discrimination and preference under the Act. Appellants' asserted right to transport free, and without publication of tariff charges for the movement, the office cars of other carriers occupied by officials traveling on their company's business, clearly rests on a distinction of that character.

The case of *New Haven R. R.* v. *Int. Com. Com.*, 200 U. S. 361, shows that the fact that transportation service is performed by one carrier for another does not remove it from the requirements of section 6. In that case there was involved a contract of the Chesapeake & Ohio with the New Haven, whereunder the former purchased coal in West Virginia and delivered the same to the New Haven at a price, which it was shown did not cover the cost of purchase and published freight rates. The decision by this court sustained the Commission's contention that the tranaction effected a departure from published rates.

In *Int. Com. Com.* v. *B. & O. R. Co.*, 225 U. S. 326, involving transportation by one carrier of fuel coal for another carrier, this court held that a railroad can not be made a favored shipper and given lower rates than other persons.

The transportation by one carrier of fuel coal for another carrier is transportation essential to its business quite as much as is transportation of its office car. In light of the above cases it is apparent that the carriers could not, by excluding from their tariffs "fuel coal when transported for other carriers for use in their necessary business" make such transportation private transportation not subject to the Act and themselves private carriers as to such transportation. Nor would it make any difference, if it was their practice to perform such transportation free upon the request of other carriers, with reservation of the right to grant or refuse each request as made.*

Appellants assert that the lower court erred in holding that office cars of carriers occupied by an official traveling on a pass and engaged in company business, were covered by those provisions in their tariffs which name minimum charges on privately owned or chartered cars. (Br. 44.) The decision of the lower court does not appear to be that car-

* Appellants cite many cases to support their position. Of those dealing with carriers subject to the I. C. Act, the important ones are discussed and clearly distinguished in the lower court's decision. It should be mentioned, however, in connection with these cases that the prohibition in section 6(7) of the Act against transportation of property unless the charges for its transportation had been published was added by the Hepburn Act of 1906. *Interstate Commerce Act, Annotated*, Vol. 2, p. 1472. The decision in *C. M. & St. P. Ry.* v. *Grant Bros.*, 68 Fed. 506, involving the special contract to transport the train of a circus company was rendered in 1895.

rier-owned private, or office cars are covered by the tariffs, but that, since the carriers hold themselves out by their tariffs to carry like cars for all others, they can not claim to be private carriers in performing the same transportation for a selected class. The fact that appellants' cars contain their private business records does not distinguish them from the private or chartered car of an individual, or an official of a corporation, who is likewise traveling on business; nor do such contents materially distinguish their cars from the private cars of individuals who are traveling for other than business purposes. The Commission report states that "apparently the only material difference between the cars on which these minimum charges apply and the private cars of other carriers is the matter of who owns or is using them." (R. 118.) Appellants are not controverting statements of fact in the Commission's report.

Moreover, in light of the prohibition in section 6 against transporting property unless the charges for its transportation have been published, and of the decisions in *Southern Ry.* v. *Reid, supra, New Haven R. R.* v. *Int. Com. Com., supra*, and *Int. Com. Com.* v. *B. & O. R. R., supra*, it seems clear that, even if appellants' published tariffs did not name charges for transportation of the private cars of individuals and corporations, they could not lawfully transport free, and without publication of tariff charges the "offices on wheels" of other carriers. Carriers subject to the Act can not, by their

very violation of the Act in performing certain transportation, make themselves private carriers not subject to the Act as to that transportation and free to continue the violation.

2. The exception in the act permitting issuance of passes for free transportation of specified individuals must be construed "with due regard to its manifest purpose" and, when so construed, it does not permit of free transportation of a private or office car along with the individual.

The decisions cited in the above chapter show that transportation for another carrier stands on the same footing under the Act as any other transportation and that the failure of a carrier subject to the Act to comply with the requirements of the Act as to the publication and collection of tariff charges can not operate to remove the transportation, or the carrier, from the Act's jurisdiction. Appellants are not apparently specifically relying upon the exceptions from the prohibition against "free passes" and "free tickets," which permit of passes for free transportation of officers of carriers and other specified individuals to show that the free transportation of a private or office car is also permitted. For this reason and for the reason that the scope properly attributable to those exceptions has been fully discussed in the companion case (*Louisville & Nashville R. R. v. United States*, No. 333) it will be here dealt with very briefly.

The above-mentioned exceptions clearly relate to persons, since the permission given is to inter-

change passes for the officials and employees of common carriers and their families. The only exceptions in the Act relating to property are those which permit of transportation free or at reduced rates for the federal and local governments and for specified charitable purposes. In *American Express Co.* v. *United States*, 212 U. S. 522, involving the question as to whether the exception permitting issuance of passes for the officers and employees of carriers made lawful the issuance of franks by express companies for free transportation of property, this court said:

> We are clearly of the opinion that, *without doing violence to the language used in section 1—including the proviso*—its terms cannot be held to include the transportation of goods. (Italics ours.)

Just as said proviso or exception can not be held to include free transportation of goods, so likewise it can not be held to include free transportation of property in the form of a private car. Clearly a provision, which permits of free transportation of specified persons can not be construed to permit of free transportation of a private car as well. Any such interpretation would be contrary to the manifest purpose of the exception. *Nashville, Chattanooga & St. L. Ry.* v. *Tennessee*, 262 U. S. 318, 323. It would disregard the elementary rule that exceptions from a policy embodied in an Act must be narrowly construed. *Spokane & Inland Empire R. R.* v. *United States*, 241 U. S. 344, 350. It

would, in fact, add to the Act an entirely new exception. In *L. & N. R. R.* v. *Mottley*, 219 U. S. 467, this court, after commenting upon the fact that Congress had manifestly considered the question as to what exceptions should be made as to free passes and free transportation, said at page 479:

> The court can not add an exception based on equitable grounds when Congress forbore to make such an exception.

3. Appellants' practice can not be likened to intercarrier contracts for trackage rights, or for detour movements and return of astray shipments of property of the general public in course of transportation—it is intercarrier only in the sense that it is the giving of free transportation service by one carrier to another or to the latter's official

Appellants argue that the practice of transporting free the office cars of other carriers when the occupying officials are engaged on their company's business can not in law be discriminatory, because it is an intercarrier matter "in which no member of the traveling or shipping public is concerned, and in which no public interest is affected." In answer, it should be first said that there can be no abstract proposition that because contracts or arrangements are made between carriers, no unlawfulness under the Act can result, either in the form of prejudice to the traveling or shipping public, or in other form affecting the public interest. Moreover, there is no similarity between the instant practice of the carriers and the examples of intercarriers contracts relied upon by appellants.

The examples most stressed are intercarrier contracts for trackage rights, whereby one carrier secures the right to operate its trains over the tracks of another, for return of "astray shipments" and for detour movements of the trains of one carrier over the tracks of another when the tracks of the former are undergoing repairs. These intercarrier contracts are in respect of transportation being performed for the general public, whereas the matter under consideration is transportation being performed for another carrier, or for its official.

Moreover, appellants' argument under this head necessarily conflicts with reasoning, which they have advanced to show that a carrier, in transporting free the office car of another acts in the capacity of a private carrier not subject to the Act. In support thereof they stated that the transporting carrier assumed no obligation in advance to transport cars free of charge. "The right to grant or refuse the movement is always reserved." (Br. 12.) So that, there is no contract by one carrier to carry free the cars of another based on the consideration that that other will carry its cars free of charge. Mutuality of consideration is at most a mere hope—each movement of a private, or office, car stands by itself, and each is performed free of charge. In any event if there were consideration of such character it would make no difference. As said by the Commission:

> Reciprocity between carriers is no justification for the free transportation of pri-

> vate cars. It will be observed that railway equipment generally which is not in revenue service is not handled on that principle, and it could not be so handled lawfully. Moreover, the returns to our questionnaire show that there is seldom a fair balance between the service performed by different carriers in transporting the private cars of each other. On the contrary, the returns show that there is often a wide difference in the relative amount of service performed in hauling such cars. No one has contended that the theory of reciprocity warrants the free handling of private cars. Transportation must be paid for in cash and not in commodities or services. *In re Contracts for Free Transportation*, 16 I. C. C. 246; *United States* v. *C. I. & L. Ry. Co.*, 163 Fed. 114; *Louisville & Nashville R. R. Co.* v. *Mottley*, 219 U. S. 270. (R. 118.)

Appellants admit that an office car on a foreign line is no part of the transporting carrier's equipment (Br. 12) and their argument under their principal contention rests on the premise that the transportation by one carrier of the office car of another, moving on business of the latter, is transportation for the owning carrier or for its official, although of private character and performed by the transporting carrier in a private capacity not subject to the Act. If such transportation is an inter-carrier matter of such character that the provisions of the Act are not applicable thereto, why do appellants and other carriers publish charges

for all kinds of railway equipment, when transported for the sole benefit of the owning carrier?

The decisions in *New Haven R. R.* v. *United States*, 200 U. S. 361, and in *Int. Com. Com.* v. *B. & O. R. R.*, 225 U. S. 326, which show respectively that the transportation of fuel coal for another railroad is subject to section 6 and that the transportation of fuel coal for another railroad at reduced rates subjects other shippers to undue prejudice, in violation of section 3 have been above mentioned. Transportation of fuel coal for a carrier is quite as essential to its business as is transportation of its office car occupied by an official engaged in its business. Both might be termed inter-carrier matters, but that fact does not remove the transportation from the operation of the Act's provision or from the jurisdiction of the Commission thereunder.

4. The commission's administrative findings of unjust discrimination and undue preference under sections 2 and 3 of the act are supported by substantial evidence

Coming, now, to the Commission's findings of unjust discrimination and undue preference and prejudice in violation of sections 2 and 3 of the Act appellants' brief reads (page 62):

> The sole ground on which the Commission and the lower court predicated the finding of unjust discrimination and undue preference and prejudice was the fact that the office car movements in the past have been free,

> whereas the movements of special privately owned, or chartered cars have been at tariff rates. This fact, says the lower court, "is alone sufficient evidence of discrimination." (R. 144.)

Appellants contend, in substance, that there can be no unjust discrimination in law as between carriers which obtain free transportation of their office cars when occupied by officials engaged in company business and the general public, which must pay the tariff charges for like service, because no competitive commercial relationship exists between the carriers who are given the preference and the general public, which is subjected to the prejudice.

In connection with this contention it must be kept in mind that transportation of a private car, whether, on the one hand, transported for a carrier, or for its official, or some other individual entitled to a personal pass, or, on the other hand, transported for some member of the traveling public, is transportation in respect of passenger travel. A private car is not an industrial product at the moment under transportation to market in commercial competition. It is property already marketed and in use and its transportation for the owner or user can be likened to the transportation free for a passenger of excess baggage, or of articles which under the tariffs can not be checked as baggage, such as bicycles or automobiles. (R. 111.) The kind of service here involved, and the character of the pref-

erence given to a railroad or its official, or other passholder, by appellants' practice will be made clear by considering a supposititious case in respect of private cars on which the tariffs name charges. Assuming, for example, that appellants' tariff charges on privately owned or chartered cars, in addition to excluding (or failing to include) carrier-owned private cars, expressly excluded the privately owned or chartered cars of all lawyers, could it be said that a lawyer traveling for recreation in a chartered car was not given a preference over paying passengers covered by the tariffs, if the railroads performed the transportation on a single passenger ticket? In the event that he was traveling on business of an employing firm of such kind as necessitated his having with him voluminous records and a stenographer, could it be said that his employer was not given a preference, if the railroads transported the car and the two employees on two passenger tickets?

Appellants' construction of sections 2 and 3 of the Act to require that, before the Commission can find discrimination to be unjust or undue a competitive commercial relationship must exist between the parties given a preference and the parties subjected to prejudice, would make their provisions unworkable in respect of passenger train service. Many passenger trains run daily between the cities and towns of the country carrying passengers traveling for recreation purposes of many

kinds, for educational purposes of many kinds, for business purposes of many kinds (sometimes their own but more often an employer's) and for many other purposes. All such passengers are clearly entitled under the Act to equality of service for the same charges and to equality of charges for the same service without inquiry by the Commission into the particular purpose of the travel of each.[9]

In *Wisconsin R. R. Comm.* v. *C. B. & Q. R. R. Co.*, 257 U. S. 563, involving the validity of an order entered by the Commission for the purpose of removing discrimination against interstate commerce caused by the lower level of intrastate fares this court said at page 579:

> We have two questions to decide.
>
> First. Do the intrastate passenger fares work undue prejudice against persons in interstate commerce, such as to justify a horizontal increase of them all?
>
> Second. Are these intrastate fares an undue discrimination against interstate commerce as a whole which it is the duty of the Commission to remove?
>
> We shall consider these in their order.
>
> First. The report and findings of the Commission undoubtedly show that the intrastate fares work an undue discrimination against travellers in interstate commerce and against localities (*Houston, East & West*

[9] Persons traveling at party rates, commutation rates, or excursion rates are in a different class from ordinary passengers for reasons which justify the differentiation from a transportation standpoint.

> *Texas Ry. Co.* v. *United States*, 234 U. S. 342) in typical instances numerous enough to justify a general finding against a large class of fares. * * * [10]

In view of the broad general class of passengers traveling in interstate and intrastate commerce, it is clear that this statement could not have been made if it were true that, before the Commission can find unjust discrimination in respect of passenger travel, it must inquire into the varied purposes of travel of the passengers to determine whether, as between each and all of those given a preference and each and all of those subjected to prejudice, there exists competitive commercial grounds upon which to base a finding that the discrimination is unjust and undue.

III. NEITHER THE COMMISSION NOR CONGRESS HAS SANCTIONED THE PRACTICE OF TRANSPORTING FREE THE PRIVATE OR OFFICE CARS OF OTHER CARRIERS WHEN OCCUPIED BY A PASSHOLDER

The final ground asserted by appellants against the validity of the Commission's order is that the Commission has in the past sanctioned the practice of the carriers in moving free the office cars of another carrier, and that Congress has impliedly ratified and recognized such practice as lawful. In support appellants claim that the practice has

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[10] The validity of the order as a whole was sustained on the second ground, namely, that the low level of intrastate fares cast a burden on interstate commerce in that they did not yield their fair share of the revenue necessary to maintain an efficient transportation service.

always existed as the Commission and Congress have well known.

Having in mind the extensive duties of the Commission, the vast volume of records on file with it, and the varied provisions of the Act, it is clear that it can never be said to have sanctioned any particular interpretation of the statute unless such interpretation was squarely in issue before it for decision. As lending emphasis to this, the court's attention is called to the very different grounds asserted in this and its companion case as rendering the practice lawful, and to the fact that, whereas in *Louisville & Nashville R. R.* v. *United States*, No. 333, appellants are asserting that transportation free of private cars for all individuals entitled to passes is lawful, here appellants contend that transportation of office cars only is lawful. *Whether they are contending that the Commission has sanctioned the whole practice, or only that part which they regard as lawful, is not made clear.*

Appellants point to the Commission's conference rulings, which prescribe a form of pass reading as follows:

> Pass John Smith, President, car, and five officers and employees of the X Y Z Ry. Co.

The Commission has abandoned the practice of making conference rulings. They were not its decisions in a proceeding, wherein it would have had the benefit of a record and the views of opposing counsel. They were rescinded *in toto* December 26, 1928.

Appellants also point to the Commission's Regulations to Govern the Form and Recording of Passes which, in the 1917 issue, prescribed a form of pass substantially following that prescribed in its conference rulings. In prescribing said Regulations to Govern the Form and Recording of Passes, the Commission likewise acted informally and ex parte in that its action was pursuant to section 20,[1] paragraph (5) whereof gives the Commission the following authority:

> The Commission may, in its discretion, prescribe the forms of any and all accounts, records, and memoranda to be kept by carriers subject to the provisions of this Act, including the accounts, records, and memoranda of the movement of traffic, as well as of the receipts and expenditures of moneys.
> • • •

Referring to this contention of appellants the Commission's report reads:

> In support of this contention it is pointed out that our conference ruling No. 95 and our pass regulations of 1917 both prescribed a form of pass for railway officials and employees which included the word "car." Of course, such a pass would be proper for the

[1] The order of July 30, 1929, which is attacked in the petition as well as the order of November 4, 1929, is not, as alleged in the petition, an order within the meaning of section 16 (8) of the Act. Section 20 carries its own penalties, but they are for keeping different records than those prescribed by the Commission or for falsifying records. (34 Stat. 594.)

> the movement of a home-line private car, and it is understood that the practice is to issue passes for such cars, at least on some lines. But the Association of Railway Executives urges that the form of pass prescribed applied to foreign-line cars, since it provided for naming the carrier, which was not required in the case of a pass for the officers or employees of the home line. The form of pass does not specifically indicate whether it is for home or foreign-line cars, or both. It might, in fact, be construed as including any kind of a car, even though subject to tariff charges. Under these circumstances we think that the pass form should be given a construction in harmony with the law. Certainly, we never intended to approve the practice of issuing passes for the private cars of other lines. However, our conference rulings have all been canceled, and our pass regulations will be amended so as to make clear that a car pass may be issued only for home-line cars. (R. 115, 116.)

Prior to the proceeding herein involved the practice of transporting free the private cars of other carriers was called to the Commission's attention in three cases only. The Commission's report remarks upon those cases as follows:

> Our attention is not directed to any decision of a formal or informal nature in which we have approved the practice of handling private cars of other lines without charge,

> and diligent search has failed to disclose any such decision. In two cases we referred to the use of "car and party" passes by officers of so-called tap lines or industrial lines as being improper and unlawful. *The Tap Line Case*, 23 I. C. C. 277, 298; *Colorado Free Pass Investigation*, 26 I. C. C. 491, 494. The only other case in which any consideration has heretofore been given to the free transportation of private cars was *The Five Per Cent case*, 31 I. C. C. 351. At page 410 of that report we referred to revenue which the carriers might have derived by charging tariff rates on private cars handled free. In effect we told the carriers that they should look to this among other means of increasing their revenues, but apparently they have not heeded our recommendation. The lawfulness of the practice was not brought in issue and was not passed upon in that proceeding. Clearly we have never ruled that private cars may lawfully be transported without charge for other carriers or their officials. (R. 116.)

The decision in the *Tap Line cases* turned upon the Commission's view that the particular roads were plant facilities rather than industrial common carriers, and in the *Five Per Cent case* the lawfulness of the practice was not in issue. So that it is true that these cases can not be claimed by the Commission as squarely holding the practice to be unlawful, for the precise conditions were not presented and passed upon. But it is that very

thing that makes the rule of statutory construction invoked by petitioners inapplicable to this case.

The principle of statutory construction, whereby the interpretation given to ambiguous language in a statute by the body charged with its administration is held to have been adopted by Congress, if the statute is subsequently reenacted without change in the particulars so construed, obviously can not be loosely applied. In the first place, there is no room for the application of any such principle where the language is plain and unambiguous. Appellants are not claiming that their cars are not property transported for their benefit, and, apparently, they are not relying overmuch on the exception in the Act, which permits of passes for specified individuals. Secondly, unless the administrative body has ruled precisely as to the proper interpretation to be given an ambiguous statute, it is obvious that Congress can not be said to have adopted such interpretation by reenactment of the statute. That is, even assuming ambiguity in the statute under consideration, Congress can not be said to have adopted an ambiguous interpretation to cure such ambiguity in its legislation. Having in mind the informal manner in which the form of pass was prescribed by the Commission, the character of the statutory authority under which it acted and the uncertainty as to what it did mean, the Commission's action in this particular can not be regarded as its considered and precise interpretation of the statute. In the *Tap Line Cases* the Commission

condemned the use of "car passes" by individual carriers, and in the *Five Per Cent Case* it referred to revenue which the carriers might have secured by exacting charges for transportation of private cars. All that can be said of those cases is that the Commission failed to interpret the statute and declare the general practice of transporting free the cars of other carriers unlawful.

In *United States* v. *Mo. Pac. R. R. Co.*, 278 U. S. 269, involving paragraph (4) of section 15 of the Act, which restricts the Commission from requiring carriers to join in through routes that exclude their long hauls, the Commission construed the paragraph as only protecting the long hauls of originating carriers, or carriers in possession of the traffic. This construction followed the interpretation given to the paragraph by a long line of decisions of the Commission involving somewhat similar situations. The Court did not consider that the precise conditions were involved in those cases. In holding that Congress could not be said to have adopted the interpretation contended for the Court said at pages 279–280:

> And appellants assert that the Commission in a long line of decisions has held that the rule declared in paragraph (4) applies only to traffic in possession of the carriers, and they argue that this construction was impliedly sanctioned by the inclusion of the provision without alteration in Transportation Act, 1920. But the rule that reenactment of a statute after it has been construed

by officers charged with its enforcement impliedly adopts the construction applies only when the construction is not plainly erroneous and to cases presenting the precise conditions passed on prior to the re-enactment. *New Haven R. R.* v. *Interstate Commerce Comm'n.*, 200 U. S. 361, 401. The rule has no application in this case because, the decisions by the Commission do not show that it had given paragraph (4) the limited effect claimed by appellants; the order here involved conflicts with that provision; and, if any prior decision of the Commission held that the Act empowered it to establish a through route substantially like the one under consideration, that construction was plainly erroneous and did not attach to or become a part of the provision re-enacted.

In *American Express Co.* v. *United States*, 212 U. S. 522, there was involved the question as to whether the provisions of the Act permitting carriers to grant passes to their own officials and employees, and interchange passes to the officials and employees of other carriers embraced permission to grant franks for free transportation of property to such officials and their employees. The court held that the pass provisions of the Act could not be construed to include the transportation of goods, and this despite the fact that it was contended that the custom of issuing franks was of long standing and presumably known to Congress; that there was no record of any protest against it by the Commission, nor any suggestion in any

speech in Congress that it was supposed to be detrimental to the public interest or intended to be prohibited.

In the instant situation it can not be asserted that rights or interests of substantial kind have been assumed in reliance upon the alleged administrative interpretation, which fact is in sharp contrast with the situation in *Logan* v. *Davis*, 233 U. S. 627, one of the outstanding decisions relating to the weight to be given to an interpretation given to an ambiguous statute by the body charged with its administration. In that case this court said at page 627:

> * * * Many thousands of acres have been patented to individuals under that interpretation, and to disturb it now would be productive of serious and harmful results. The situation therefore calls for the application of the settled rule that the practical interpretation of an ambiguous or uncertain statute by the Executive Department charged with its administration is entitled to the highest respect, and, if acted upon for a number of years, will not be disturbed except for very cogent reasons. *United States* v. *Moore*, 95 U. S. 760, 763; *Hastings and Dakota Railroad Co.* v. *Whitney*, 132 U. S. 357, 366; *United States* v. *Alabama Great Southern Railroad Co.*, 142 U. S. 615, 621; *Kindred* v. *Union Pacific Railroad Co.*, 225 U. S. 582, 596.

Appellants in the companion case called attention to the fact that the Commission decision in the

Five Per Cent Case was reported to Congress in its Annual Report. But there was no issue as to the unlawfulness of the carriers' practices in that case and the most that can be said of the decision is that the Commission failed to declare the practice unlawful. If the Commission's oversight to take steps to stop every violation of the Act, which study of the vast volume of tariffs and other records on file with it might disclose, or its failure to take steps to stop every practice, perhaps known to it in a general way but not squarely brought to its attention as a violation of the Act, should be regarded as interpretations sanctioning such violations of law, and the subsequent reenactment of the act by Congress as an adoption of such interpretations, the Interstate Commerce Act would present a mass of provisions as to which the ordinary meaning of words would afford no guide to their proper interpretation and legal meaning.

Furthermore, the Commission's order rests both upon its conclusion that the carriers' practice violates the statutory prohibitions in section 6 and upon its administrative findings that the practice results in unjust discrimination and undue prejudice in violation of sections 2 and 3. Viewed from the administrative standpoint, the most that can be urged by virtue of the inclusion of the word "car" in the pass form prescribed is that it was the then judgment of the Commission that the practice did not result in unjust discrimination.

The Commission's failure to prosecute and its alleged past rulings in respect of a former pass can not be urged as in any way restricting its present judgment upon administrative questions. If this were not true, once the Commission has found certain practices reasonable and nondiscriminatory, it would thereafter be foreclosed from prescribing any different practices. As said in *Virginian Ry.* v. *U. S.*, 272 U. S. 658, at pp. 665, 666:

> The finding of reasonableness, like that of undue prejudice, is a determination of a fact by a tribunal "informed by experience." *Illinois Central R. R. Co.* v. *Interstate Commerce Commission*, 206 U. S. 441, 454. This Court has no concern with the correctness of the Commission's reasoning, with the soundness of its conclusions, or with the alleged inconsistency with findings made in other proceedings before it. *Interstate Commerce Commission* v. *Union Pacific R. R. Co.*, 222 U. S. 541.

CONCLUSION

The decree of the lower court denying the prayer for injunction and dismissing the petition for want of equity should be affirmed.

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SUPREME COURT OF THE UNITED STATES.

No. 517.—October Term, 1930.

The Kansas City Southern Railway Company and Texarkana and Fort Smith Railway Company, Appellants,
v.
The United States of America and Interstate Commerce Commission.

Appeal from the District Court of the United States for the Western District of Missouri.

[February 25, 1931.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

This suit was brought to set aside two orders of the Interstate Commerce Commission of November 4, 1929, and July 30, 1929, respectively (155 I. C. C. 775), relating to the transportation by carriers subject to the Interstate Commerce Act of private passenger-train cars, including so-called office cars, of other carriers free or at other than published tariff rates. The orders are the same as those under review in *Louisville & Nashville Railroad Company* v. *United States*, decided this day. 282 U. S. —. Treating the two orders, which deal with the same subject matter, as substantially one requirement, the appellants challenge it "so far as it prohibits the movement of an office car of another carrier upon such terms as the interested parties may mutually agree upon, when such office car is occupied exclusively by officers and employees of the company owning the car and traveling upon business in connection with the operation of their own railroad." They also object to so much of the order as purports to regulate movements which are strictly intrastate. The District Court, constituted as required by statute, sustained the orders of the Commission and dismissed the petition.

This suit in the District Court for the Western District of Missouri was begun in February, 1930, sometime after the suit of the *Louisville & Nashville Railroad Company, supra*, assailing the same orders, was brought in the District Court for the Western

District of Kentucky. The petitioners in both suits were parties to the proceeding in which the orders of the Commission were made. The United States and the Interstate Commerce Commission made no reference in their answers in the present case to the pendency of the earlier suit, but after decree in that suit the Commission amended its answer herein, setting up that decision as an affirmative defense. The defense was that the Urgent Deficiencies Act of October 22, 1913 (c. 32, 38 Stat. 208, 219-221; U. S. C. Tit. 28, secs. 43-47) which transferred to the several District Courts the jurisdiction to enjoin orders of the Commission, a jurisdiction formerly vested in the Commerce Court, was not intended to create conflicting jurisdictions among the several District Courts and, after the jurisdiction of one District Court had been unsuccessfully invoked to enjoin an order of the Commission, to permit the jurisdiction of another District Court subsequently invoked to be exercised for a similar purpose.

It is unnecessary to review the history of the legislation authorizing suits to be brought to set aside orders of the Interstate Commerce Commission. The effect of the Urgent Deficiencies Act was to redistribute the jurisdiction of the Commerce Court. *Vicksburg, Shreveport & Pacific Railway Company* v. *Anderson-Tully Company*, 256 U. S. 408, 414. The venue provisions of the Urgent Deficiencies Act (U. S. C., Tit. 28, sec. 43) are as follows:

"The venue of any suit brought to enforce, suspend, or set aside, in whole or in part, any order of the Interstate Commerce Commission shall be in the judicial district wherein is the residence of the party or any of the parties upon whose petition the order was made, except that where the order does not relate to transportation or is not made upon the petition of any party the venue shall be in the district where the matter complained of in the petition before the commission arises, and except that where the order does not relate either to transportation or to a matter so complained of before the commission the matter covered by the order shall be deemed to arise in the district where one of the petitioners in court has either its principal office or its principal operating office. In case such transportation relates to a through shipment the term 'destination' shall be construed as meaning final destination of such shipment."

We find no provision of the applicable statutes which deprives a District Court of jurisdiction of a suit brought by a party entitled to attack an order of the Interstate Commerce Commission in accordance with these provisions as to venue. But the existence

of jurisdiction does not mean that it must be exercised and that grounds may not be shown for staying the hand of the Court. Compare *Langnes* v. *Green*, decided this day, 282 U. S. —. The appellants, upon proper application, could have been allowed to intervene in the earlier suit brought for the same purpose in the District Court for the Western District of Kentucky (U. S. C., Tit. 28, sec. 45a) and could have presented there all of their grounds of attack upon the orders in question. The orders of the Interstate Commerce Commission may apply throughout the country, and there may be cases where the convenience of the parties and the interests of justice may make appropriate separate suits by different parties affected by the same order. The question is thus one for the sound discretion of the District Court, in which such a suit is brought, to determine whether it should be permitted to continue or proceedings therein should be stayed, pending the final outcome of an earlier suit for the same purpose, to the end that there may not be a multiplicity of suits without substantial reason. As, however, the defendants here did not raise the question of the pendency of the earlier suit until the day of final hearing, several months after the suit was begun, we see no reason for disturbing the action of the District Court in this respect.

Upon the merits, the appellants present the argument that a railway company, in the transportation or movement of an office car of another carrier, acts in the capacity of a private carrier, or bailee, and retains full freedom of contract in relation to such transportation. There is no doubt that common carriers subject to the Interstate Commerce Act may have activities which lie outside the performance of their duties as common carriers and are not subject to the provisions of the Act. *Santa Fe, Prescott & Phoenix Railway Company* v. *Grant Brothers Construction Company*, 228 U. S. 177, 188; *Terminal Taxicab Company* v. *Public Utilities Commission*, 241 U. S. 252. But a common carrier dealing with transportation that is subject to the Act cannot escape its statutory obligations by calling itself a private carrier as to such transportation. This applies to its transactions with other carriers. See *New York, New Haven and Hartford Railroad Company* v. *Interstate Commerce Commission*, 200 U. S. 361, 391, 392; *Interstate Commerce Commission* v. *Baltimore and Ohio Railroad Company*, 225 U. S. 326, 341, 342. Upon grounds which have been

stated in the opinion of the Court in the *Louisville & Nashville* case, *supra*, we have concluded that, in view of the facts found by the Commission, the transportation of the cars in question falls within the provisions of the Interstate Commerce Act, and that the order of the Commission in directing the carriers to cease and desist from transporting such cars free or at less than published transportation rates was within its authority.

With respect to the contention that the Commission's order undertakes to regulate movements of office cars in intrastate commerce, it is enough to say that no such complaint was made in the petition in this suit. The Commission's order is construed as intended to apply to transportation within the purview of the Interstate Commerce Act, and no different application of it is disclosed by the record.

Decree affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

